88-375

No.

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

HWESU S. MURRAY,

Petitioner,

vs.

NATIONAL BROADCASTING COMPANY, INC., and BRANDON TARTIKOFF,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Court of Appeals improperly engrafted upon 42 U.S.C. §1981 a previously unknown property requirement, which renders §1981 merely coextensive with §1982, in affirming the dismissal of a *per se* violation of §1981.

2. Whether the Court of Appeals substantially departed from the accepted and usual course of proceedings on a motion for summary judgment and disregarded decisions of this Court, including *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S.Ct. 2505 (1986), when it drew inferences, and resolved the disputed novelty issue, against the non-movant

petitioner, and against the evidence, including respondents' admissions.

3. Whether the Court of Appeals substantially departed from the accepted and usual course of proceedings on a motion for summary judgment and disregarded decisions of this Court, including Anderson v. Liberty Lobby, Inc., when it only considered one issue, that raised by the movants, and disregarded genuine issues and material facts which make the sole issue considered not dispositive of petitioner's claims, and which results in a conflict among the Circuits.

4. Whether petitioner has been arbitrarily and capriciously deprived of his property and denied the rights

and remedies available to all other similarly situated litigants in New York in violation of the due process clause of the Fifth Amendment to the United States Constitution.

LIST OF PARTIES

All parties to the proceeding in the United States Court of Appeals are named in the caption. The Carsey-Werner Company, Marcia Carsey and Thomas Werner were additional named defendants in the complaint, but petitioner voluntarily dismissed his claims against them prior to the United States District Court's grant of summary judgment and subsequent appeal.

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HWESU S. MURRAY,

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and BRANDON TARTIKOFF,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Petitioner Hwesu S. Murray respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court

of Appeals for the Second Circuit entered in the above-entitled proceeding on April 18, 1988.

OPINIONS BELOW

The opinions of the Court of Appeals for the Second Circuit, majority and dissenting, are reported at 844 F.2d 988, and are reprinted in the Appendix hereto ("App.") at 1a. The opinion of the District Court for the Southern District of New York is reported at 671 F. Supp. 236, and is reprinted in the Appendix hereto at 23a.

JURISDICTION

Following the decision of the District Court for the Southern District of New York, granting respondents' motion for summary

judgment, dated July 15, 1987 and entered July 16, 1987, a judgment was made and entered on July 22, 1987 dismissing the complaint (App. 70a). The opinion and judgment (App. 72a) of the Court of Appeals for the Second Circuit sought to be reviewed, which affirmed the decision of the District Court, were made and entered April 18, 1988. The Court of Appeals denied petitioner's petition for rehearing, with suggestion for rehearing en banc, on June 1, 1988 (App. 74a). This petition is being served and filed within 90 days thereof.

The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

42 U.S.C.§1981 Equal rights under the law

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses and exactions of every kind, and to no other.

42 U.S.C. §1982 Property rights of citizens

> All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.

Rule 56(c) of the Federal Rules of Civil Procedure

> (c) MOTION AND PROCEEDINGS THEREON. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if

the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

Amendment V to the United States Constitution

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in

cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

STATEMENT OF THE CASE

Petitioner Hwesu S. Murray, a Black American, has been employed by respondent National Broadcasting Company, Inc. ("NBC") since 1979 as a Unit Manager and financial analyst.

His accomplishments prior to 1979, include graduate degrees in broadcast journalism and law and the production of scores of television shows. His accomplishments since 1979 include the creation of an original proposal for a television series entitled "Father's Day", which was subsequently misappropriated by respondents and used as "The Cosby Show", a series heralded as unique, novel and a breakthrough by the press, the public and respondents. It has also been described as innovative and a breakthrough by the Court of Appeals (844 F.2d at 992; App. 10a).

Petitioner initiated this action in 1985 to seek redress for the theft of his property,"Father's Day", and the

skill, effort, expense and time he expended in creating and developing it, and for NBC's refusal to engage his services. Petitioner seeks recovery under the Civil Rights Act (42 U.S.C. §§ 1981 and 1982), under the Lanham Act (15 U.S.C. §1125(a)), and upon theories of misappropriation, conversion, breach of implied contract, breach of a confidential relationship, unjust enrichment and fraud. Respondents moved for summary judgment contending that one of the ideas contained within "Father's Day" was not novel and that, for that reason alone, petitioner had no federal or state remedy for the unlawful use by respondents of "Father's Day", which is assumed on this motion. Summary judgment was

granted and the complaint dismissed by the District Court, and the Court of Appeals, in a split decision, affirmed. It is respectfully submitted that those decisions were not only miscarriages of justice, but conflict with applicable decisions of this Court, the courts of New York and the Fifth Circuit Court of Appeals, and so far depart from the accepted and usual course of judicial proceedings such as to call for an exercise of this Court's power of supervision.

The following statements are taken from the majority or dissenting opinions of the Court of Appeals or are otherwise established on the record and not in dispute. "Father's Day" was a proposal for a specific television

show, which included specific characters, their number, background, age, portrayals and relationships, the setting and socio-economic situations, the focus of the show (the father), the themes and situations to be used in the series. In other words, it is a literary property in the form of an original series treatment and format, pursuant to the custom and usage of the television industry. "Father's Day" is an original creation derived from petitioner's own life. Its creation and submission to NBC were outside of the scope of his employment at NBC.

In 1980, petitioner contacted NBC about some ideas and proposals he had for television programs, including for "Father's Day", and about his interest

in supplying programs to NBC. NBC invited petitioner to submit the proposals, including "Father's Day", in writing. The submission of "Father's Day" was explicitly made in confidence and on the express conditions that, if it were used, petitioner would be the supplier and executive producer and receive the proper credits and compensation as the show's executive producer and creator. NBC subsequently expressed interest in "Father's Day" and encouraged petitioner to submit it to Josh Kane, a top official of NBC Entertainment and a direct assistant to respondent Brandon Tartikoff, President of NBC Entertainment.

Petitioner spoke to Kane who invited petitioner to "flesh out" "Father's Day" and submit it to him. Petitioner spent months developing "Father's Day" further and submitted an expanded written treatment to Kane. Petitioner also made an oral presentation to Kane, providing further aspects of "Father's Day" to him. The second submission and presentation were made under the same conditions as the first. Several weeks after the submission to Kane, Kane orally informed petitioner that Kane's superiors, presumably Tartikoff, had decided not to "acquire" petitioner's "rights" in "Father's Day". Kane then returned petitioner's original documents with a memorandum stating

that NBC was not interested in developing "Father's Day" "at this time". Kane conceded that proposals were returned because they "belonged" to the submitter. Unknown to petitioner, NBC retained one or more copies of "Father's Day".

In the fall of 1984, NBC began broadcasting "The Cosby Show." It was later revealed to the public that Tartikoff was the person credited with the original idea for "The Cosby Show". Petitioner wrote to NBC to discuss this situation several times during the following months, but to no avail. Instead, he received denials and the statement that NBC had chosen not to acquire the "rights" in "Father's Day"

from petitioner. This ultimately led to the institution of this action.

The above facts are established by the evidence and, even more important, they are undisputed for the purposes of respondents' summary judgment motion. In summary, in a business transaction, NBC solicited "Father's Day", and its further development, had petitioner expend time, labor and expense to develop it, then deceived him and misappropriated it for enormous benefit, without any compensation to him.

Both of the courts below have approved such behavior. They did so by assuming the subject matter of the action to be merely the theft of a single abstract idea of a

nonstereotypical black middle-class family in a situation comedy. 844 F.2d at 992; App. 11a. That is indeed how respondents characterized it in their motion. But that is merely what petitioner referred to in his initial conversation with an official of NBC. That is not what "Father's Day" or his submissions are, nor what petitioner seeks to protect, but only the most simplistic statement of part of the idea underlying "Father's Day".

The courts below stated that the sole issue to be adjudicated is the "novelty" of that one, single, general idea from "Father's Day". Then the courts, in order to find lack of novelty, necessarily engaged in the improper process of resolving clearly

disputed issues in favor of the moving party. That improper process is clear from the dispute between the majority and the dissent on the meaning of NBC's contract concerning "The Cosby Show" which dispute appears in high relief in the decisions of the Court of Appeals (844 F.2d at 993 and 996; App. 12a-13a and 19a-20a). The courts below also resolved all ambiguities and drew all inferences in favor of the moving party and adverse to petitioner and completely ignored or disregarded all legal precedents and undisputed material facts which demonstrated that "Father's Day" was novel, that many of petitioner's claims were separate and independent from any novelty requirement, and that, at the least,

these matters were sufficiently disputed as to preclude disposition by summary judgment. The courts below ignored the undisputed fact on the motion that "Father's Day" was novel, at least as to NBC, which is all that is required in New York to maintain even a claim for merely the misappropriation of an idea. Not only did the Court of Appeals ignore that fact but their opinion begins with a discussion of Bill Cosby and a 1965 article about him. This emphasizes that Court's mistaken approach, since there is no dispute that "The Cosby Show" originated with NBC and Tartikoff as opposed to Bill Cosby -- and NBC misappropriated it from petitioner. In other words, Bill Cosby has nothing to

do with this action, nor any financial stake in its outcome, much less respondents' motion. Nor have respondents contended that the 1965 article had anything to do with either "Father's Day" or "The Cosby Show".

NBC contracted with The Carsey-Werner Company ("Carsey-Werner") to be the supplier of "The Cosby Show". That contract concedes that the "literary property, program idea and/or program format" for "The Cosby Show", which is assumed to be "Father's Day" for purposes of this motion, is a "unique, intellectual property," which was provided by, and remains the property of, NBC. That fact was ignored by the District Court. The Court of Appeals dealt with that fact

by deciding that the language should be construed contrary to its express terms. 844 F.2d at 993; App. 12a-13a. That is totally improper on a summary judgment motion, particularly when respondents offered no evidence to even support such a construction. Both courts below also ignored respondents' other admissions of novelty and of petitioner's rights in and to "Father's Day" independent of novelty or any alleged lack thereof.

The agreement with Carsey-Werner also forms part of the basis of petitioner's Civil Rights Act claims. Simply put, NBC dealt with and contracted with Ms. Carsey and Mr. Werner, on the same program for which they refused to deal with petitioner,

because petitioner is Black. Once the courts below erroneously concluded that "Father's Day" was not a "novel" idea, and therefore not "property" as an idea, they dismissed the claim arising under 42 U.S.C. §1982, which deals with property. However, on the same basis, the courts below, inexplicably and illogically, dismissed the claim arising under 42 U.S.C. §1981, which deals with contracts, not property, on the same basis.

In summary, the decision of the Court of Appeals contravenes the most basic standards to be applied in considering summary judgment as established by this Court.

REASONS FOR GRANTING THE WRIT

The decision of the Court of Appeals sanctions the assumed theft of petitioner's property, "Father's Day," the result of his time, labor and expense, leaves him without remedy in law or equity, and "prematurely denies [him] a fair opportunity to establish his right to participate in the enormous wealth generated by 'The Cosby Show'" (844 F.2d at 997; App. 22a). The decision of the Court of Appeals also creates the bizarre precedent that the courts will "deny governmental protection to any idea previously mentioned anyplace, at anytime, by anyone" (844 F.2d at 997; App. 21a).

The decision of the Court of Appeals has emasculated 42 U.S.C. §1981

by engrafting on it a property requirement, making it merely coextensive with §1982. The Court of Appeals has also contravened decisions of this and other federal courts, and has actually reversed the standards to be applied in the federal courts on consideration of summary judgment motions. On the sole issue it did consider, the novelty of one idea within "Father's Day", it improperly resolved the disputed issue; did so by manufacturing out of whole cloth inferences adverse to petitioner; and did so despite admissions by respondents which established the issue in petitioner's favor. The second way in which the Court of Appeals has re-written summary judgment in the federal courts is to only consider the

facts and issue raised by the movant, and to ignore all other material facts and genuine issues raised by the non-movant which, if considered, would preclude summary judgment.

Therefore, in order to prevent the effective judicial repeal of 42 U.S.C. §1981 and the total misapplication of summary judgment in the federal courts, it is respectfully submitted that this petition must be granted.

1. THE COURT OF APPEALS IMPROPERLY ENGRAFTED UPON 42 U.S.C.§1981 A PREVIOUSLY UNKNOWN PROPERTY REQUIREMENT WHICH RENDERS §1981 MERELY CO-EXTENSIVE WITH 42 U.S.C. §1982

This Court has ruled that there is a violation of §1981 "if a private offeror refuses to extend to a Negro, solely because he is a Negro, the same opportunity to enter into contracts as he extends to white offerees." Runyon v. McCrary, 427 U.S. 160, 170-71, 96 S. Ct. 2586, 2594 (1976). That is exactly what is alleged in this case and assumed on the summary judgment motion, which precludes summary judgment herein.

The Fifth Circuit has held that absence of a §1982 claim does not preclude a §1981 claim. Gonzalez v. Southern Methodist University, 536 F. 2d 1071 (5th Cir. 1976), cert. denied, 430 U.S. 987 (1977). Yet, the majority's decision below is to the

contrary, making §1981 merely coextensive with §1982, and creating a conflict between Circuit Courts. The majority's attempt to argue that it is requiring a contract right to underlie a §1981 claim is disingenuous. It is merely making a contract right dependent on a property right, which is protected by §1982, with the sole citation to an inapposite New York State case. 844 F.2d at 995; App. 16a. In addition, by interpreting §1981 by reference to New York law, instead of the law established by this Court, the Court of Appeals is erroneously subordinating §1981 to state law. See, e.g., Basista v. Weir, 340 F.2d 74, 86 (3rd Cir. 1965). Thus, if a particular state chooses, it can emasculate the

scope of §1981 within its borders. In this case, the Court of Appeals has necessarily held that a Black person cannot seek recovery under §1981 for a blatant per se deprivation of his right to make a contract unless that contract involves a tangible piece of "property" as defined by the courts of New York.

The decision of the Court of Appeals not only directly contravenes decisions such as Runyon v. McCrary, and creates a conflict among the Circuits, but also, quite simply, is the result of ignoring the most basic rule of application of §1981. That is to construe it liberally to effect the purposes intended by Congress. See, e.g., Jones v. Alfred H. Mayer Co., 392 U.S. 409 (1968); Adams v. McDougal, 695

F.2d 104, 108 (5th Cir. 1983). Therefore, it is respectfully submitted that this petition be granted so that the effective repeal of §1981 by the Court of Appeals may be reversed.

2. IN ITS DETERMINATION OF THE ONLY ISSUE IT CONSIDERED, NOVELTY OF AN IDEA, THE COURT OF APPEALS DREW INFERENCES AND RESOLVED THE FACTUAL ISSUE AGAINST THE NON-MOVANT PETITIONER, DESPITE RESPONDENTS' ADMISSIONS SUSTAINING PETITIONER, THEREBY ERADICATING SUMMARY JUDGMENT AS IT CURRENTLY EXISTS IN THE FEDERAL COURTS.

Respondents' summary judgment motion contended that one of petitioner's ideas within "Father's

Day" was not novel, therefore not property, and that therefore all of petitioner's federal and state claims must be dismissed. The Court of Appeals admittedly considered only the issue of the novelty of one idea, i.e., only the issue raised by the movants. However, even in that limited analysis, that Court drew adverse inferences, and resolved the disputed factual issue, against the non-movant petitioner. That was done despite admissions by respondents of petitioner's rights and the novelty and property of "Father's Day". This was a direct contradiction of the standards to be applied on a summary judgment motion in the federal courts, and of established precedent, including decisions of this Court.

In its agreement with Carsey Werner concerning "The Cosby Show", NBC inserted a paragraph for the explicit purpose of judicial definition to allow NBC to apply to the courts to obtain equitable relief to protect their "property". That paragraph (15(b)) states that willful failure by Carsey-Werner to perform the agreement "shall cause NBC irreparable loss of a unique, intellectual property" (emphasis added). In paragraph 25(c), the "property" is defined as "the story, literary property, program idea, and/or program format which form(s) the basis" of "The Cosby Show". It is assumed for the purposes of respondents' summary judgment motion that "Father's Day" was the "literary

property, program idea and/or program format" which was the basis of "The Cosby Show." Indeed, it is undisputed that "Father's Day" was the only related literary property in NBC's possession at the time that contract was prepared.

Thus, these statements are admissions that "Father's Day" not only constitutes property, but includes a unique idea capable of judicial protection as property.

The dissent below recognized that this, "at a minimum," constitutes evidence of novelty, resulting in a question of fact (844 F.2d at 996; App. 20a). That precludes summary judgment under well-established precedent.

However, the majority weighed the evidence and determined this "genuine issue" on a limited summary judgment record, which this Court has explicitly held to be improper. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249, 106 S. Ct. 2505, 2511 (1986). In order to resolve this issue against petitioner, the non-movant, the majority necessarily drew inferences against him, which this Court has also explicitly held to be improper. Id., 477 U.S. at 255, 106 S.Ct. at 2513; United States v. Diebold, Inc., 369 U.S. 654, 82 S.Ct. 993 (1962). Indeed, such inferences had to be drawn in a vacuum since respondents offered no evidence that that contractual language meant anything other than what it says

on its face or that supports the inferences drawn.

As stated by the dissent below,

> Nor is the agreement the only piece of evidence indicating an issue of fact as to novelty. In 1985, NBC admitted that Murray had "rights" in his idea, but determined it had no interest in acquiring those rights...Cosby and Tartikoff stated that they believed The Cosby Show to be novel and unique. NBC admitted that the reason it normally returned rejected submissions, as it did in Murray's case, was that the "material belong[ed] to the submitter." In short, there is substantial evidence, both within and independent of the Carsey-Werner development agreement, which directly conflicts with the majority's holding that, as a matter of law, Murray's idea was not novel.

844 F.2d at 996-997; App. 21a.

In light of this evidence, it is clear that the Court of Appeals'

decision is in direct conflict with the decisions of this Court and all other federal courts establishing and applying the standards to be used in considering summary judgment. As noted supra, the Court of Appeals improperly drew inferences in favor of the non-movant and tried disputed issues of fact, rather than merely determining their existence. Anderson v. Liberty Lobby, Inc., supra; Donahue v. Windsor Locks Board of Fire Commissioners, 834 F.2d 54 (2d Cir. 1987). Ultimately, "the evidence presents sufficient disagreement to require submission to a jury" and is not "so one-sided that one party must prevail against the other as a matter of law." Anderson, supra, 477 U.S. at 251-252, 106 S. Ct. at 2512.

Indeed, the dispute between the majority and the dissent in the Court of Appeals illustrates dramatically how and why a holding that a trier of fact could not have found in favor of petitioner on the disputed issue is impossible.

Indeed, in light of respondents' own statements, the only possible way the issue could be decided on summary judgment is in favor of petitioner. To sanction the decision of the Court of Appeals would be to eradicate summary judgment as it currently exists in the federal courts, and to allow trial by affidavit.

There is another aspect of the novel idea issue which was not even mentioned by the majority of the Court

of Appeals, but was necessarily and improperly tried and resolved. That is the simple issue of whether "Father's Day" was novel to respondents, as opposed to "novel" to mankind.

It is assumed that respondents used "Father's Day" and petitioner's ideas within it and it is undisputed that "Father's Day" and the ideas therein were novel to respondents when submitted to them. New York law protects such proposals and ideas on that basis alone in an action against the recipient of the proposal. This was recognized by the dissent below in citing Werlin v. Readers Digest, Inc., 528 F. Supp. 451, 466 (S.D.N.Y. 1981), which stands for that fact, and contrasting it with Downey v. General

Foods Corp., 31 N.Y. 2d 56, 60, 334 N.Y.S.2d 874, 877-878 (1972), which case is the lynchpin of the majority's decision. 844 F.2d at 997; App. 21a-22a. Downey involved an idea of which defendant was not only aware, but which had previously been used by defendant. Indeed, this vital qualification to the "novelty test" has existed from the first of the "novelty" cases - Soule v. Bon Ami, 201 A.D.794, 195 N.Y.S. 574 (2d Dep't 1922), aff'd, 235 N.Y. 609 (1923) - to the present - Ferber v. Sterndent Corp., 51 N.Y.2d 782, 433 N.Y.S.2d 85 (1980) (wherein the New York Court of Appeals denied protection only after the plaintiff, contrary to this case, failed to provide "any evidence" that his idea

was novel "either" in the abstract "or" as to defendants).

Since there was no evidence, indeed no allegation, that respondents were aware of the idea for "Father's Day" prior to its submission, this issue should not have been resolved against petitioner, particularly on a motion for summary judgment. The only way it could have been resolved against petitioner is for the Court to have drawn adverse inferences against him, the non-movant, and done so in the absence of any evidence. For the well-established reasons set forth supra, that is palpably improper.

In summary, the Court of Appeals in this case has reversed the standards to be applied in the application of

summary judgment in the federal courts, in contravention of established precedent, including decisions of this Court. Therefore, it is respectfully submitted that this petition be granted so that the decision of the Court of Appeals can be reversed.

3. BY DISREGARDING MATERIAL FACTS WHICH RAISE GENUINE ISSUES, DISTINCT FROM AND INDEPENDENT OF THE QUESTION OF NOVELTY, WHICH PRECLUDE SUMMARY JUDGMENT, THE COURT OF APPEALS HAS REWRITTEN FEDERAL RULE OF CIVIL PROCEDURE 56 TO PROVIDE THAT THE FEDERAL COURTS SHALL ONLY CONSIDER THE FACTS AND ISSUES RAISED BY THE MOVANT ON A SUMMARY JUDGMENT MOTION.

The Court of Appeals erred drastically in its consideration of the issue of novelty of an idea contained within "Father's Day". That Court erred just as egregiously in its failure to consider material facts concerning which there are genuine issues which allow for petitioner's recovery, separate and apart from any novelty requirement.

The Court of Appeals commenced its discussion in its opinion by quoting Federal Rule of Civil Procedure 56(c) that there must be "no genuine issue as to any material fact". 844 F.2d at 992; App. 8a. However, the Court of Appeals then went on to summarily identify petitioner's submission as simply an idea, define the idea as

merely the nonstereotypical portrayal of a black middle-class family in a situation comedy, and then discuss whether that idea is novel. There are material facts which the Court of Appeals disregarded which, at the least, raise genuine issues not even discussed by that Court.

For example, the Court of Appeals found "that New York law requires that an idea be original or novel for it to be protected..." 844 F.2d at 993; App. 13a. Thus, even the Court of Appeals ruled that there was at least one material fact separate and distinct from novelty - originality. Yet originality is not discussed by that Court. Originality, as opposed to novelty, merely requires that the

proposal "represents the independent efforts of the author". Nimmer, 3 Nimmer on Copyright § 16.08[B] at 16-58 (1986). Despite the irrelevant dicta of the courts below concerning Bill Cosby, the evidence shows, and it is undisputed here, that "Father's Day" was petitioner's original creation; indeed that it was based on petitioner's own life. Therefore, it is respectfully submitted that the submission of "Father's Day" is protected as a matter of law. At the minimum, there is a genuine dispute about this material fact precluding summary judgment and requiring a reversal. To say otherwise, as the majority of the Court of Appeals did, is to rewrite Rule 56(c) as well as

overturn decisions such as Anderson v. Liberty Lobby, Inc.

The Court of Appeals erred in its analysis of this case from the very beginning due to its summary adoption of respondents' mischaracterization of the most material fact involved - what it is that petitioner submitted and seeks to protect. He did not merely submit the bare idea of a "nonstereotypical portrayal of a black middle-class family in a situation comedy." 844 F.2d at 992; App. 11a. He submitted two written proposals and an oral presentation for a specific television show, which included specific characters, their number, background, age, portrayals and relationships, the setting and

socio-economic situation, the focus of the show - the father, and the themes and situations to be used in the series, and the format. In short, petitioner submitted a complete, original treatment and format. This is what respondents stole from petitioner and used for their own benefit. Indeed, respondents' theft included every part of "Father's Day" down to and including such details as using five children with the eldest being away at college. It is the theft of all of this that the Court of Appeals has condoned, not merely the vague, general idea to which that Court expressly limited its sole analysis. Most importantly, it is this which the Courts of New York have protected.

E.g., Cole v. Phillips H. Lord, Inc., 262 A.D.2d 116, 28 N.Y.S.2d 404, 406 (1st Dep't 1941) ("there is a well-recognized right to an original idea or combination of ideas set forth in a formula for a program."); Robbins v. Frank Cooper Associates, 19 A.D.2d 242, 241 N.Y.S.2d 259 (1st Dep't 1963), rev'd on other grounds, 14 N.Y.2d 913, 252 N.Y.S.2d 318 (1964); Stone v. Goodson, 8 N.Y.2d 8, 200 N.Y.S.2d 627 (1960).

As recognized by the New York courts, e.g., in Cole, property rights exist in submissions of program proposals such as "Father's Day" for radio and television broadcasting, a special industry having customs and usages of its own. Indeed, this is

admittedly recognized by respondents as indicated by their definition of property in the agreement with Carsey-Werner. New York is a center of the entertainment industry and the courts of New York have always afforded protection to persons in petitioner's position. The decision of the Court of Appeals has nullified that protection and state policy by its improper revision of the application of summary judgment in the federal courts.

The Court of Appeals misconstrued what petitioner submitted to respondents and, thus, what is the very subject matter of this action. The Court of Appeals, without discussion, drew inferences against petitioner. Indeed, that Court simply adopted

respondents' mischaracterization of "Father's Day", in the face of contrary evidence, just as the District Court had done. It is respectfully submitted that it would be impossible to deviate any further from the standards to be applied on a summary judgment motion, as established by this Court, than to blindly accept the unsupported inferences proposed by the moving party, especially when evidence to the contrary is present.

Another material fact overlooked by the Second Circuit is the business context and manner of "Father's Day" submission to respondents. It was solicited by NBC from a person experienced in the industry and submitted in confidence and pursuant to

agreement. These circumstances are absent in the line of cases relied on by respondents and the Second Circuit. The Fifth Circuit, in a case with which the Second Circuit has put itself in conflict, clearly recognizes that New York's novelty test is applied to "unsolicited" ideas. Official Airlines Schedule Information Service, Inc. v. Eastern Airlines, Inc., 333 F.2d 672, 675 (5th Cir. 1964).

These material facts point out the major and vital distinctions between this case and Downey v. General Foods Corp., supra, on which the courts below relied so heavily. Downey involved a simple, sales-gimmick idea - using the word "wiggle" or a variation thereof as a name under which to market Jell-O.

In Downey, the court found no confidential relationship nor contractual obligation, based on the facts surrounding the submission. Since that unsolicited disclosure was otherwise unprotected, the novelty of the simple idea was examined as a separate basis for recovery. Since defendant had previously used the idea, there was no novelty and thus no recovery on any theory. Downey is thus completely inapposite to this case while Cole, for example, is nearly identical. By overlooking facts held material in the relevant cases and drawing inferences against petitioner, the Court of Appeals affirmed the grant of summary judgment in spite of the presence of genuine issues of material

facts, and in conflict with the standards set forth by this Court in Anderson v. Liberty Lobby, Inc.

A further material fact is that Murray developed "Father's Day" as a result of his own substantial effort and skill and at his own expense.

The materiality of this fact has been pointed out by this Court. When a valuable idea is developed at substantial effort, and misappropriated for defendants' own profit and to the disadvantage of plaintiff, the defendants "cannot be heard to say that it is too fugitive or evanescent to be regarded as property." International News Service v. Associated Press, 248 U.S. 215, 240, 39 S.Ct. 68, 73 (1918). This Court also said, in a situation

such as this, where the subject matter is that out of which both parties are seeking to make profits in the same field, "we hardly can fail to recognize that for this purpose, and as between them, it must be regarded as quasi-property, irrespective of the rights of either as against the public" (id, 248 U.S. at 236, 39 S.Ct. at 71). The fact that petitioner has valid claims where NBC is "taking material that has been acquired by complainant as the result of...the expenditure of labor, skill and money..." (id., 248 U.S. at 239, 39 S.Ct. at 72) is also established by decisions of the courts of New York, as well as by decisions of the Second Circuit. See, e.g., Standard & Poor's Corp. v. Commodity

Exchange, 683 F.2d 704, 710 (2d Cir. 1982); Decorative Aides Corp. v. Staple Sewing Aides Corp., 497 F. Supp. 154, 160 (S.D.N.Y. 1980), aff'd, 657 F.2d 262 (2d Cir. 1981); Metropolitan Opera Ass'n v. Wagner-Nichols Recorder Corp., 199 Misc. 786, 101 N.Y.S.2d 483, 490-494 (Sup. Ct. N.Y. Co. 1950), aff'd, 279 A.D. 646, 108 N.Y.S.2d 977 (1st Dep't 1951).

In other words, this Court has previously ruled that persons such as petitioner, who are in the same business as those who misappropriate petitioner's property, i.e., respondents, have rights and property interests, at least vis-a-vis respondents. The courts of New York have adopted this ruling. Only the

courts below in this case have ignored this and have failed to consider all of petitioner's property rights.

In summary, genuine issues of material fact exist. The lack of any issue on this record can only be because it has been resolved in the non-movant's, i.e., petitioner's, favor. Indeed, the facts ignored by the Court of Appeals are so central and crucial, establishing petitioner's rights, that the affirmance of the grant of summary judgment not only conflicts with decisions of this Court but "has so far departed from the accepted and usual course of judicial proceedings, [and] so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's

power of supervision." Rule of the Supreme Court of the United States 17(a).

4. THE COURT OF APPEALS HAS ARBITRARILY AND CAPRICIOUSLY DEPRIVED PETITIONER OF HIS PROPERTY WITHOUT DUE PROCESS OF LAW BY DENYING TO PETITIONER THE PROTECTION GIVEN TO ALL SIMILARLY SITUATED LITIGANTS, IN VIOLATION OF THE FIFTH AMENDMENT TO THE CONSTITUTION.

It has long been recognized by the courts in New York and by this Court that the property and quasi-property of "Father's Day" is protected, separate and independent of any "novel idea" requirement. Petitioner's rights and remedies for the protection of such

property are available to all persons possessed of those property rights in New York, except for petitioner, to whom they have now been arbitrarily denied. Such a deprivation of a property interest, in an arbitrary or capricious manner or for an arbitrary or capricious reason, is a denial of his constitutionally protected right to due process. E.g., Whitaker v. Board of Higher Education, 461 F.Supp. 99, 103-104 (E.D.N.Y. 1978) (and cases cited therein).

In Werlin, supra, Point II, decided years after Downey, supra, so heavily relied on by the courts below, the Court refused to permit a plaintiff to be deprived of her property in remarkably similar circumstances.

There, as here, the idea in the proposal was concededly novel to the recipient. Judge Pratt, in his dissenting opinion in the Court of Appeals, confirmed the applicability of Werlin to the instant case (844 F.2d at 997; App. 22a). The majority never discussed Werlin at all and simply disregarded it, as the District Court had done. No attempt was made by either Court to distinguish that case from the instant one or to explain why that case is not dispositive in petitioner's favor. Werlin is premised on unjust enrichment, a remedy long available to litigants in New York. Miller v. Schloss, 218 N.Y. 400, 407 (1916). That remedy has been available to past and present litigants situated

similarly to petitioner. The Werlin and Miller cases and the remedy they provide remain valid law in New York. The protection they provide will be available to all future similarly situated litigants. Petitioner clearly qualifies for that protection.

This Court has held, in International News Service, supra, Point III, that a business person has a right to protection of the fruit of his labor and expense. Here, petitioner concededly expended time, labor and expense in submitting and developing "Father's Day" at the solicitation and encouragement of NBC. International News Service, and the doctrine of estoppel upon which it is, in part, premised, preclude a defendant, such as

NBC in these circumstances, from denying that a proposal such as "Father's Day" constitutes property which may be protected. International News Service has been adopted by the Courts of New York and is still valid law in New York.

Neither of the courts below made any attempt to distinguish International News Service or to explain why petitioner has been denied the protection provided by this Court in International News Service, for which petitioner clearly qualifies.

New York law has traditionally protected its citizens from the unlawful conversion of their property including valuable paper documents, such as the "Father's Day" documents

which were, as established on this record, retained by NBC, without petitioner's knowledge or permission, and used by NBC in the creation and development of "The Cosby Show". Both the "Father's Day" documents themselves and their contents are petitioner's property which was unlawfully converted by NBC. New York has protected these rights, which originate in the physical pieces of paper, not the novelty of an idea, and include the exclusive rights to the use of their contents, without regard to any novelty requirement. (Veeco Instruments, Inc. v. Candido, 70 Misc.2d 333, 334 N.Y.S.2d 321, 323 (Sup. Ct. Nassau Co. 1972); Taft v. Smith, Gray & Co., 76 Misc. 283, 134 N.Y.S. 1011, 1013 (App. Term 1912)

(emphasis added) ("This property right not only attaches to the physical or corporeal substance..., but includes the incorporeal right to the exclusive use of its contents."); Traveltown, Inc. v. Gerhardt Investment Group, 586 F.Supp. 256 (N.D.N.Y. 1984).

None of these authorities were cited or even mentioned by either of the courts below. They have denied to petitioner the traditional protection afforded by New York against conversion of valuable documents and the contents thereof, although such protection has been and will continue to be afforded to similarly situated litigants.

New York law has specifically granted protection to literary property, program ideas, program

formats, treatments and stories submitted in the entertainment industry. Where, as is the case here with "Father's Day", the program proposals were submitted in confidence and subject to an agreement to pay for their use, protection is given without regard to the novelty of the ideas. In the television and radio industries, with their particular customs and usages, this is property. Such protection was expressly given, in circumstances virtually identical to this case, to program ideas and formats which were concededly not novel. (Cole, supra, Robbins, supra, Point 3). Indeed, Judge Pratt, in his dissent below, expressly recognized their

applicability to this case (844 F.2d at 997; App. 21a).

The majority below, in refusing to apply the Cole principles to this case, did not even attempt to distinguish the cases. Rather, the majority simply said petitioner's reliance on Cole was "misplaced" in light of later cases, principally Downey (844 F.2d at 993; App. 13a). Thus, the Court was suggesting, in effect, that Downey had overruled Cole. However, New York's Second Department and Court of Appeals in Downey made it clear that they were distinguishing Cole and Robbins, and not overruling them. 37 A.D. 250, 323 N.Y.S.2d 578 (2d Dep't 1971), rev'd, 31 N.Y.2d 56, 334 N.Y.S.2d 874 (1972). Years after Downey, both Cole and

Robbins are cited as controlling law in New York (e.g., 21 N.Y. Jur.2d, Contracts §4, p. 414 (1982)). These precedents remain available to protect all litigants in the entertainment industry - except for petitioner, to whom their protection has inexplicably been denied.

Based on the foregoing, it is clear that petitioner has been deprived of his valuable property in circumstances in which New York law and this Court have expressly provided protection for such property. The wrongful deprivation of those property rights has been achieved through the denial to petitioner of the protection afforded by New York to all similarly situated litigants and which has been

and will be relied on by past and future litigants. The denial of such protection to petitioner has been done without explanation and for no apparent reason and, therefore, constitutes the deprivation of his property in an arbitrary and capricious manner. That this has been done on the limited record of a summary judgment motion only emphasizes the degree of arbitrary and capricious conduct engaged in by the Court of Appeals in dismissing petitioner's entire complaint.

In dismissing that complaint in total disregard and contradiction of the authorities which expressly protect petitioner in these circumstances deprives petitioner of his property rights without due process of law, in

violation of his rights under the Fifth Amendment to the Constitution of the United States.

CONCLUSION

For the foregoing reasons, a writ of certiorari should issue in this case to review the judgment and opinion of the Second Circuit Court of Appeals.

Dated: New York, New York
August 25, 1988

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 515—August Term, 1987

(Argued: February 1, 1988 Decided: April 18, 1988)

Docket No. 87-7695

HWESU S. MURRAY,

Plaintiff-Appellant,

—v.—

NATIONAL BROADCASTING COMPANY, INC. and BRANDON TARTIKOFF,

Defendants-Appellees.

Before:

WINTER, PRATT and ALTIMARI,

Circuit Judges.

Appeal from an order of the United States District Court for the Southern District of New York (Miriam Goldman Cedarbaum, *Judge*) granting defendants-appellees' motion for summary judgment and dismissing the complaint for failure of plaintiff-appellant to demonstrate protectible interest in an idea for a proposed television series.

Affirmed.

Judge Pratt dissents in a separate opinion.

JOSEPH J. SANTORA, New York, N.Y. (Michael S. Allen, Santora & McKay, New York, N.Y., of counsel), *for plaintiff-appellant*.

THOMAS R. JONES, New York, N.Y. (Susan Buckley, Lisa Pearson, Ellen L. Weintraub, Cahill Gordon & Reindel, New York, N.Y., of counsel), *for defendants-appellees*.

ALTIMARI, *Circuit Judge*:

It was almost a generation ago that a young comedian named Bill Cosby became the first black entertainer to star in a dramatic network television series. That program, *I Spy*, earned Cosby national recognition as an actor, including three Emmy Awards (1966, 1967 and 1968) for best performance in a dramatic series, and critical acclaim for the portrayal of a character without regard to the actor's race. Although keenly aware of the significance of his achievement in breaking the color line on network television, Cosby set his sights then on "accomplish[ing] something more significant for the Negro on TV."[1] In an interview in 1965, he envisioned a different approach to the situation comedy genre made popular by *The Dick*

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1 Lardine, *Looking to the Future: Bill Cosby Has Dreams of an All-Negro TV Series*, New York Daily News, Sept. 19, 1965, Sunday Magazine, at 6.

Van Dyke Show. The *Daily News* described Cosby's "dream" series as not

> unlike other situation comedies. There'll be the usual humorous exchanges between husband and wife. . . . Warmth and domestic cheerfulness will pervade the entire program.
>
> Everything on the screen will be familiar to TV viewers. But this series will be radically different. Everyone in it will be a Negro.
>
> * * *
>
> . . . "I'm interested in proving there's no difference between people," [explained Cosby]. "My series would take place in a middle-income Negro neighborhood. People who really don't know Negroes would find on this show that they're just like everyone else."[2]

Nearly twenty years later, on September 20, 1984, Cosby's dream for a "color-blind" family series materialized with the premier of *The Cosby Show*—a situation comedy about a family known as the Huxtables. Bill Cosby stars in the leading role as Heathcliff ("Cliff") Huxtable together with his TV wife Clair and their five children.

Plaintiff-appellant Hwesu Murray, an employee of defendant-appellee ("NBC"), claims in the instant case that in 1980, four years prior to the premier of *The Cosby Show* on NBC's television network, he proposed to NBC a "new" idea for a half-hour situation comedy starring Bill Cosby. In a written proposal submitted to NBC, Murray described his series called "Father's Day" as "wholesome . . . entertainment"

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2 *Id.*

> which will focus upon the family life of a Black American family. . . . The leading character will be the father, . . . a devoted family man and a compassionate, proud, authority figure. . . .
>
> * * *
>
> . . . The program may well resemble "Father Knows Best" and "The Dick Van Dyke Show." It will be radically different from "The Jeffersons," "Good Times," "Different Strokes," and "That's My Mama." The father will not be a buffoon, a supermasculine menial, or a phantom. . . . The program will show how a Black father can respond with love . . . , and will present . . . a closely-knit family. . . .

On this appeal from an order of the United States District Court for the Southern District of New York (Cedarbaum, *J.*) granting defendants-appellees' motion for summary judgment, we are asked to determine whether, under New York law, plaintiff has a legally protectible interest in his idea which he maintains was used by NBC in developing *The Cosby Show*. Because we agree with the district court's conclusion that, under New York law, lack of novelty in an idea precludes plaintiff from maintaining a cause of action to prevent its unauthorized use, we affirm the district court's order granting summary judgment and dismissing the complaint.

BACKGROUND

Plaintiff Hwesu S. Murray has been employed in the television industry for the past ten years. Murray holds a Bachelor of Arts degree in English and graduate degrees in broadcast journalism and law. In 1979, defendant-

appellee NBC hired Murray as a Unit Manager and financial analyst in its sports division. A year later, plaintiff contacted an NBC official outside of NBC Sports about some "extracurricular" ideas he had for future television programs, and the official apparently instructed him to submit his proposals in writing. Soon thereafter, in June 1980, plaintiff submitted five written proposals, one of which was entitled "Father's Day." Murray allegedly informed NBC that if it were interested in any of the proposals, he expected to be named executive producer and to receive appropriate credit and compensation as the creator of the eventual program. Plaintiff also allegedly told NBC that his ideas were being submitted in confidence.

Murray's proposal for "Father's Day" is the subject matter of this action. The NBC official who originally had requested it encouraged Murray to "flesh out" his proposal and submit it to Josh Kane, then an NBC vice-president and a top official with NBC Entertainment, the division of NBC responsible for network television programming. Plaintiff thereupon submitted to Kane an expanded proposal for "Father's Day." In a two-page memorandum dated November 1, 1980, Murray first suggested that Bill Cosby play the part of the father. At that time, plaintiff also made several other casting suggestions, including roles for a working spouse and five children, and again indicated that the proposed series would "combine humor with serious situations in a manner similar to that of the old *Dick Van Dyke Show*" but "with a Black perspective." Murray's expanded proposal concluded with the observation that, "[l]ike *Roots*, the show will attempt to depict life in a [closely-knit] Black family, with the addition of a contemporary, urban setting."

NBC apparently decided not to pursue Murray's proposal. On November 21, 1980, Kane returned the

"Father's Day" submission to plaintiff and informed him that "we are not interested in pursuing [its] development at this time."

Four years later, in the fall of 1984, *The Cosby Show* premiered on NBC. *The Cosby Show* is a half-hour weekly situation comedy series about everyday life in an upper middle-class black family in New York City. The father, played by Bill Cosby, is a physician, and the mother is a lawyer. In its first season, *The Cosby Show* soared to the top of the Nielsen ratings and has become one of the most popular programs in television history. The show is highly regarded by critics and is also a huge commercial success.

Less than a month after viewing the premier, plaintiff wrote to NBC to advise it that *The Cosby Show* had been derived from his idea for "Father's Day." In January 1985, NBC responded through its Law Department, stating its position that " 'Father's Day' played absolutely no role in the development of 'The Cosby Show' . . . [since m]uch of the substance and style of 'The Cosby Show' is an outgrowth of the humor and style developed by Bill Cosby throughout his career." NBC further maintained that *The Cosby Show* was developed and produced by The Carsey-Werner Company ("Carsey-Werner"), an independent production company and the executive producers of the series.

In his complaint, plaintiff claimed that *The Cosby Show*'s portrayal of a strong black family in a nonstereotypical manner is the essence of "Father's Day," and "[i]t is that portrayal of Black middle-class life that originated with plaintiff." Murray also alleged that Josh Kane showed plaintiff's "Father's Day" proposal to his superiors at NBC, including defendant-appellee Brandon Tartikoff, President of NBC Entertainment. Tartikoff,

together with Cosby and Carsey-Werner, have been credited with the creation and development of *The Cosby Show*. Plaintiff maintains that NBC and Tartikoff deliberately deceived plaintiff into believing that NBC had no interest in "Father's Day" and then proceeded to develop and eventually produce plaintiff's idea as *The Cosby Show*.

Plaintiff's complaint stated a number of causes of action arising out of defendants' alleged appropriation of his idea. Among those relevant to this appeal are plaintiff's claims of race discrimination under 42 U.S.C. §§ 1981 and 1982, false designation of origin under the Lanham Act, 15 U.S.C. § 1125, and various state law claims, including misappropriation, conversion, breach of implied contract, unjust enrichment and fraud. Plaintiff sought, *inter alia*, damages and declaratory and injunctive relief as the "sole owner of all rights in and to the idea, proposal and property [known as] 'Father's Day.' "

In a decision dated July 15, 1987, 671 F. Supp. 236 (S.D.N.Y.), the district court considered whether plaintiff's idea was "property" that could be subject to legal protection. Since the parties agreed that New York law applied to plaintiff's claims, the district court proceeded to analyze defendants' motion for summary judgment in light of the New York Court of Appeals decision in *Downey v. General Foods Corp.*, 31 N.Y.2d 56, 334 N.Y.S.2d 874, 286 N.E.2d 257 (1972). In *Downey*, the New York court established the general proposition that "[l]ack of novelty in an idea is fatal to any cause of action for its unlawful use." 334 N.Y.S.2d at 877 (quoting *Bram v. Dannon Milk Prods., Inc.*, 33 A.D.2d 1010, 307 N.Y.S.2d 571, 571 (1st Dep't 1970)) (emphasis added). The district court, therefore, determined that the "sole issue" before it

was the novelty of plaintiff's "Father's Day" proposal, and accordingly assumed, for purposes of defendants' motion, that defendants in fact used plaintiff's idea in the development of *The Cosby Show*. *See Ed Graham Productions, Inc. v. National Broadcasting Co.*, 75 Misc. 2d 334, 347 N.Y.S.2d 766, 769 (Sup. Ct. N.Y. Cty. 1973) (even assuming defendant used plaintiff's idea, plaintiff may not recover if idea is "wholly lacking in novelty").

In focusing on the novelty of plaintiff's proposal, the district court determined that Murray's idea was not subject to legal protection from unauthorized use because "Father's Day"

> merely combined two ideas which had been circulating in the industry for a number of years—namely, the family situation comedy, which was a standard formula, and the casting of black actors in nonstereotypical roles.

The district court found that, to the extent "Fathers Day," in Murray's words, "may well resemble 'Father Knows Best' and 'The Dick Van Dyke Show,' " it could not be considered novel. In addition, the portrayal of a black family in nonstereotypical roles, according to the court, precluded a finding of novelty because 1) the television networks already had cast some black actors, including Bill Cosby himself, e.g., *I Spy* (1965-68), *The Bill Cosby Show* (1969-71), and *Fat Albert and the Cosby Kids* (1972-79), in such roles, and 2) the idea of combining the family situation comedy theme with an all-black cast already had been suggested publicly by Bill Cosby some twenty years before the creation of *The Cosby Show*. The district court also determined that Murray's casting of Bill Cosby in the lead role in "Father's Day" was no mere coincidence. Rather, it was "further evidence that Cosby

is connected—even in plaintiff's mind—with the concept that plaintiff seeks to monopolize."

In view of the foregoing, the district court granted defendants' motion for summary judgment and dismissed the various claims presented in the complaint, concluding that the lack of novelty in plaintiff's proposal was fatal to any cause of action for unauthorized use of that idea.

DISCUSSION

I.

Our review of the instant appeal is limited to deciding whether the district court properly concluded that there was "no genuine issue as to any material fact" entitling defendants to "judgment as a matter of law." Fed. R. Civ. P. 56(c). Summary judgment is appropriate when, after drawing all reasonable inferences in favor of the party against whom summary judgment is sought, no reasonable trier of fact could find in favor of the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-49 (1986); *Heyman v. Commerce and Industry Insurance Co.*, 524 F.2d 1317, 1320 (2d Cir. 1975).

As the district court recognized, the dispositive issue in this case is whether plaintiff's idea is entitled to legal protection. Plaintiff points to "unique"—"even revolutionary"—aspects of his "Father's Day" proposal that he claims demonstrate "genuine novelty and invention," *see Educational Sales Programs, Inc. v. Dreyfus Corp.*, 65 Misc. 2d 412, 317 N.Y.S.2d 840, 844 (Sup. Ct. N.Y. Cty. 1970), which preclude the entry of summary judgment against him. Specifically, plaintiff contends that his idea suggesting the nonstereotypical portrayal of black Americans on television is legally protectible because it repre-

sents a real breakthrough. As he stated in his affidavit in opposition to defendants' motion,

> [w]hen I created "Father's Day" I had in mind . . . a show that . . . would portray a Black family as it had never been shown before on television. . . . I also . . . desire[d] to produce a show with strong and positive role models for the Black community, and to make a statement regarding the love and integrity of the Black family to the world. I think every Black person in this country knows there has been a need for this, and that never before on television had there been a portrayal of a Black family as I created it for "Father's Day."

Murray claims that the novelty of his idea subsequently was confirmed by the media and the viewing public which instantly recognized the "unique" and "revolutionary" portrayal of a black family on *The Cosby Show*.

We certainly do not dispute the fact that the portrayal of a nonstereotypical black family on television was indeed a breakthrough. Nevertheless, that breakthrough represents the achievement of what many black Americans, including Bill Cosby and plaintiff himself, have recognized for many years—namely, the need for a more positive, fair and realistic portrayal of blacks on television. While NBC's decision to broadcast *The Cosby Show* unquestionably was innovative in the sense that an intact, nonstereotypical black family had never been portrayed on television before, the mere fact that such a decision had not been made before does not necessarily mean that the idea for the program is itself novel. *See Educational Sales Programs*, 317 N.Y.S.2d at 843 ("[n]ot every 'good idea' is a legally protectible idea").

Consequently, we do not agree with appellant's contention that the nonstereotypical portrayal of a black middle-class family in a situation comedy is novel because

> [t]o argue otherwise would be the equivalent of arguing that since there had always been baseball, and blacks in baseball, there was nothing new about Jackie Robinson playing in the major leagues—or that since there had always been schools in Little Rock, Arkansas, and blacks in schools, there was nothing new about integrating schools in Little Rock.

As appellees persuasively point out in response to this analogy, Murray has "confuse[d] the 'idea' with its execution. . . . Indeed, the idea of integration . . . had been discussed for decades prior to the actual events taking place." Similarly, we believe, as a matter of law, that plaintiff's idea embodied in his "Father's Day" proposal was not novel because it merely represented an "adaptation of existing knowledge" and of "known ingredients" and therefore lacked "genuine novelty and invention." *Educational Sales Programs*, 317 N.Y.S.2d at 844.

We recognize of course that even novel and original ideas to a greater or lesser extent combine elements that are themselves not novel. Originality does not exist in a vacuum. Nevertheless, where, as here, an idea consists in essence of nothing more than a variation on a basic theme—in this case, the family situation comedy—novelty cannot be found to exist. *Id.*; *see Surplus Equipment, Inc. v. Xerox Corp.*, 120 A.D.2d 582, 502 N.Y.S.2d 491, 492 (2d Dep't 1986). The addition to this basic theme of the portrayal of blacks in nonstereotypical roles does not alter our conclusion, especially in view of the fact that Bill Cosby previously had expressed a desire to do a situation comedy about a black family and that, as the district court

found, Cosby's entire career has been a reflection of the positive portrayal of blacks and the black family on television.

Appellant would have us believe that by interpreting New York law as we do, we are in effect condoning the theft of ideas. On the contrary, ideas that reflect "genuine novelty and invention" are fully protected against unauthorized use. *Educational Sales Programs*, 317 N.Y.S.2d at 844. But those ideas that are not novel "are in the public domain and may freely be used by anyone with impunity." *Ed Graham Productions*, 347 N.Y.S.2d at 769. Since such non-novel ideas are not protectible as property, they cannot be stolen.

In assessing whether an idea is in the public domain, the central issue is the uniqueness of the creation. Murray insists that there is at least a question of fact as to the novelty of "Father's Day" because *The Cosby Show* is indisputably unique. In support of this contention, plaintiff points to the fact that NBC contracted with Carsey-Werner for the right of NBC to broadcast *The Cosby Show*. The contract apparently was executed by the parties before there had been any written development of the proposed series. The "program idea" for *The Cosby Show*, however, was described in the contract as "unique, intellectual property." According to plaintiff, the inescapable conclusion is that the idea—whether it be "Father's Day" or *The Cosby Show*—could not possibly have been in the public domain if NBC expressly contracted to purchase it from Carsey-Werner.

We disagree. The Carsey-Werner contract contemplates a fully-produced television series. The contract refers to, *inter alia*, the program format, titles, set designs, theme music, stories, scripts, and art work as well as to the "pro-

gram idea." Taken together, these elements no doubt would be considered original and therefore protectible as property. On the other hand, we think it equally apparent that the mere idea for a situation comedy about a non-stereotypical black family—whether that idea is in the hands of Murray, Carsey-Werner, NBC, or anyone else—is not novel and thus may be used with impunity.

Finally, as an alternative attack on the propriety of the district court's order granting summary judgment, plaintiff posits that even if his idea was not novel as a matter of law, summary judgment still was inappropriate because his proposal was solicited by defendants and submitted to them in confidence. In this regard, Murray relies on *Cole v. Phillips H. Lord, Inc.*, 262 A.D. 116, 28 N.Y.S.2d 404 (1st Dep't 1941). Murray contends that *Cole* stands for the proposition that when an idea is protected by an agreement or a confidential relationship, a cause of action arises for unauthorized use of that idea irrespective of the novelty of the subject matter of the contract. Plaintiff's reliance on *Cole* is misplaced in light of subsequent cases, particularly the New York Court of Appeals decision in *Downey v. General Foods Corp.*, 31 N.Y.2d 56, 334 N.Y.S.2d 874, 286 N.E.2d 257 (1972). *See also Ferber v. Sterndent Corp.*, 51 N.Y.2d 782, 433 N.Y.S.2d 85, 86, 412 N.E.2d 1311 (1980) ("[a]bsent a showing of novelty, plaintiff's action to recover damages for illegal use of 'confidentially disclosed ideas' must fail as a matter of law"); *Educational Sales Programs*, 317 N.Y.S.2d at 844 ("[o]ne cannot be forever barred from using a worthwhile but unoriginal idea merely because it was once asked to be treated in confidence").

Consequently, we find that New York law requires that an idea be original or novel in order for it to be protected

as property. *See Downey*, 334 N.Y.S.2d at 877. Since, as has already been shown, plaintiff's proposal for "Father's Day" was lacking in novelty and originality, we conclude that the district court correctly granted defendants' motion for summary judgment.

II.

Having determined that plaintiff's idea is not property under New York law, we turn now to a consideration of the district court's dismissal of the various claims in the complaint.

A. *State law claims*

"[W]hen one submits an idea to another, no promise to pay for its use may be implied, and no asserted agreement enforced, if the elements of novelty and originality are absent. . . ." *Downey*, 334 N.Y.S.2d at 877. As the district court recognized, non-novel ideas do not constitute property. As a result, there can be no cause of action for unauthorized use of Murray's proposal since it was not unlawful for defendants to use a non-novel idea. We conclude therefore that the district court properly dismissed plaintiff's state law claims for breach of implied contract, misappropriation, conversion, and unjust enrichment. *See Lehman v. Dow Jones & Co.*, 783 F.2d 285, 300 (2d Cir. 1986) (Friendly, *J.*) (dismissing claim for breach of implied contract because plaintiff's ideas were neither novel nor original under New York law); *McGhan v. Ebersol*, 608 F. Supp. 277, 287 (S.D.N.Y. 1985) (dismissing claims for misappropriation, breach of fiduciary duty, and implied or quasi-contract because plaintiff's ideas were not novel or unique under New York law); *Downey*, 334 N.Y.S.2d at 877 (dismissing claims for misappropriation,

breach of express contract, breach of implied contract, and unjust enrichment after finding lack of novelty); *see also Wilson v. Bristol-Myers Co.*, 118 A.D.2d 50, 503 N.Y.S.2d 334, 336 (1st Dep't 1986) (citing *Downey* and quoting *Bram v. Dannon Milk Prods., Inc.*, 33 A.D.2d 1010, 307 N.Y.S.2d 571, 571 (1st Dep't 1970) ("[l]ack of novelty in an idea is fatal to any cause of action for its unlawful use")).

Similarly, plaintiff's fraud claim also fails since, as the district court recognized, plaintiff "cannot be defrauded of property that he does not own." Essential to a cause of action for fraud is a showing of injury as the proximate result of the alleged fraudulent conduct. *See Dress Shirt Sales, Inc. v. Hotel Martinique Assocs.*, 12 N.Y.2d 339, 239 N.Y.S.2d 660, 663, 190 N.E.2d 10 (1963). Because plaintiff's idea for "Father's Day" was in the public domain when NBC allegedly used it in the creation of *The Cosby Show*, Murray suffered no injury. His cause of action for fraud thus was properly dismissed.

B. *Civil Rights claims*

In his complaint, Murray alleged that defendants discriminated against him on account of his race, in violation of 42 U.S.C. §§ 1981 and 1982, by refusing to contract with him regarding his "Father's Day" proposal or to recognize his rights in *The Cosby Show* by contracting instead with white producers, i.e., Marcia Carsey and Thomas Werner of Carsey-Werner. Section 1981 provides in pertinent part that all citizens of the United States "shall have the same right . . . to make and enforce contracts . . . as is enjoyed by white citizens." Section 1982 extends the same protection to, among other things, the right to purchase, sell and hold personal property. The district court found plaintiff's claims for discrimination defi-

cient since they were premised on the fact that his idea "constituted property for which he could contract." Once the court determined that his idea lacked novelty, it dismissed the section 1981 and 1982 claims for failure to show a deprivation of a property right.

The existence of a protectible property interest is an essential element of a section 1982 claim. *See Memphis v. Greene,* 451 U.S. 100, 122 & n.35 (1981); *Gonzalez v. Southern Methodist University*, 536 F.2d 1071, 1072 (5th Cir. 1976), *cert. denied*, 430 U.S. 987 (1977). Section 1982 concerns only impairment of property interests because of race. *Greene*, 451 U.S. at 122. If an idea cannot be considered property, there can be no violation of section 1982. Thus, we find that the district court correctly dismissed plaintiff's section 1982 claim.

As for plaintiff's section 1981 claim, we note that in order for plaintiff to maintain a cause of action under that section, he "must show both that he was subjected to intentional discrimination, and that this discrimination interfered with a contractual relationship." *Krulik v. Board of Educ.*, 781 F.2d 15, 23 (2d Cir. 1986) (citations omitted). Although we agree with plaintiff that section 1981 does not speak in terms of property, *see Runyon v. McCrary*, 427 U.S. 160, 170-71 (1976) (section 1981 right to " 'make and enforce contracts' is violated if a private offeror refuses to extend [on account of race] the same opportunity to enter into contracts as he extends to white offerees"), section 1981 does require that there be a contract right underlying the claim. As *Downey* makes clear, however, there can be no contract right in a non-novel idea. 334 N.Y.S.2d at 877.

Furthermore, Murray's contention that he was deprived of his right under section 1981 to contract with NBC for

his services as executive producer is unfounded. Murray alleged that he submitted his "Father's Day" proposal to defendants in confidence on the understanding that if they used his idea he expected NBC to utilize his services as producer. Given the lack of novelty in plaintiff's idea, however, there could be no consideration for the alleged promise and hence no enforceable contract right upon which to base a section 1981 claim. *See Soule v. Bon Ami Co.*, 201 A.D. 794, 195 N.Y.S. 574, 576 (2d Dep't 1922) (dismissing complaint for failure to show that contract involving non-novel idea was supported by consideration), *aff'd*, 235 N.Y. 609, 139 N.E. 754 (1923); 1 Williston on Contracts, § 115 at 457 (3d ed. 1957) ("an idea lacking novelty and originality . . . will not readily be regarded . . . as . . . consideration for [a] promise").

Accordingly, the district court properly dismissed plaintiff's section 1981 claim.

C. *Lanham Act claim*

Lastly, we find that Judge Cedarbaum correctly determined that plaintiff's claim for false designation of origin, *see* Lanham Act § 43(a), 15 U.S.C. § 1125(a), regarding the credits to *The Cosby Show*, cannot survive in light of the court's granting of summary judgment against plaintiff on the issue of novelty. Even assuming defendants used plaintiff's idea, NBC's failure to designate Murray as the creator of *The Cosby Show* does not mean that the credits to the program are false since ideas in the public domain may be used with impunity and thus do not require attribution.

CONCLUSION

Our review of New York intellectual property law leads us to the inescapable conclusion that the district court did not err in deciding that there was no material issue of fact as to the novelty of plaintiff's proposal. In our judgment, the basic premise underlying the concept of novelty under New York law is that special protection is afforded only to truly innovative ideas while allowing the free use of ideas that are "merely clever or useful adaptation[s] of existing knowledge." *Educational Sales Programs*, 317 N.Y.S.2d at 844. In this case, the record indicates that plaintiff's idea for a situation comedy featuring the nonstereotypical portrayal of a black family simply was not uniquely plaintiff's creation. Accordingly, we affirm the district court's order granting summary judgment and dismissing the complaint.

Affirmed.

PRATT, *Circuit Judge*, dissenting:

Today this court holds that the idea underlying what may well be the most successful situation comedy in television history was, in 1980, so unoriginal and so entrenched in the public domain that, as a matter of law, it did not constitute intellectual property protected under New York law. Because I am convinced that the novelty issue in this case presents a factual question subject to further discovery and ultimate scrutiny by a trier of fact, I respectfully dissent.

At least for purposes of this appeal, it is given that Murray presented NBC with an idea for a television series;

that, after showing interest in Murray's initial idea, NBC then asked him to submit a more detailed proposal; and that NBC then actually used his proposal in developing *The Cosby Show*, but at the same time refused to provide any compensation to Murray. The only question on appeal is whether there is evidence to indicate that Murray's idea possessed the novelty and originality required under New York law. *See Downey v. General Foods Corp.*, 31 N.Y.2d 56, 334 N.Y.S.2d 874, 286 N.E.2d 257 (1972); *Bram v. Dannon Milk Prods.*, 33 A.D.2d 1010, 307 N.Y.S.2d 571 (1st Dep't 1970). Specifically, in order to affirm the district court judgment, this court must conclude that there is insufficient evidence to present a triable issue on novelty. *Ferber v. Sterndent Corp.*, 51 N.Y.2d 782, 784, 433 N.Y.S.2d 85, 86 (1980); *see Ed Graham Productions, Inc. v. National Broadcasting Co.*, 75 Misc. 2d 334, 337, 347 N.Y.S.2d 766, 769 (1973) (idea must be "wholly lacking in novelty").

I agree with the majority that there is some evidence that Murray's idea was not novel. But clearly, there is also evidence indicating novelty. Initially, there is the admission by NBC, in its agreement with Carsey-Werner, that the television series is "unique, intellectual property." Although NBC argues, and the majority agrees, that this clause refers to a "fully-produced television series", and not Murray's program idea, such analysis ignores two important facts.

First, the "unique, intellectual property" language is found in the remedies section of the development agreement. This section gives NBC the right to prevent the loss of its "unique, intellectual property" should Carsey-Werner fail to perform. However, if Carsey-Werner does not perform—that is, if it subsequently refuses to develop

the television series—the only "unique, intellectual property" to be protected is the program's underlying idea. In other words, from the outset NBC wanted to make certain that if its relationship with Carsey-Werner faltered, the novel idea it had given Carsey-Werner would be protected from disclosure. And because, for purposes of this appeal, we must assume that NBC got its idea from Murray, the Carsey-Werner development agreement, at a minimum, constitutes admissible evidence that Murray's idea was unique, thus making the novelty determination a question of fact. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

That the "unique, intellectual property" mentioned in the agreement refers to Murray's basic idea underlying the series rather than a fully-produced series, also finds support in the second fact the majority ignores. The definition section of the development agreement specifically defines this "property", not, as the majority contends, as "titles, set designs, theme music, stories, scripts, and art work"—indeed, these are separately defined in the agreement as the "elements" to be developed by Carsey-Werner—but rather, the development agreement defines the actual "property" exclusively to be the "story, literary property, program idea, and/or program format *which form(s) the basis*" for the television series. This provision provides additional evidence that it was Murray's underlying idea, not the developed elements of the series as a whole, which NBC desired to protect as unique and novel property.

Nor is the agreement the only piece of evidence indicating an issue of fact as to novelty. In 1985, NBC admitted that Murray had "rights" in his idea, but determined it had no interest in acquiring those rights. At trial, both Cosby and Tartikoff stated that they believed *The Cosby*

Show to be novel and unique. NBC admitted that the reason it normally returned rejected submissions, as it did in Murray's case, was that the "material belong[ed] to the submitter." In short, there is substantial evidence, both within and independent of the Carsey-Werner development agreement, which directly conflicts with the majority's holding that, as a matter of law, Murray's idea was not novel.

The fact that the basic idea had been expressed by Cosby some fifteen years before Murray submitted his proposal to NBC does not erase these factual issues. To say, as a matter of law, that an idea is not novel because it already exists in general form, would be to deny governmental protection to any idea previously mentioned anywhere, at anytime, by anyone. I do not believe New York law defines "novelty" so strictly, especially in the area of mass communications, an area long recognized by state courts as "a specialized field having customs and usages of its own" where "a property right exists" in "a combination of ideas evolved into a program." *Cole v. Phillip H. Lord, Inc.*, 262 A.D. 116, 121, 28 N.Y.S.2d 404, 409 (1st Dep't 1941). Indeed, in a market the very existence of which depends on the generation and development of ideas, it may be impossible to formulate a concept that has not previously been expressed by someone, somewhere.

Novelty, by its very definition, is highly subjective. As fashion, advertising, and television and radio production can attest, what is novel today may not have been novel 15 years ago, and what is commonplace today may well be novel 15 years hence. In this instance, where Cosby expressed the concept almost a decade and a half before Murray submitted his proposal, where it was Murray's idea that NBC actually used, where there is no evidence in-

dicating NBC knew anything of the program idea until Murray submitted it, *compare Downey v. General Foods Corp.*, 31 N.Y.2d 56, 60, 334 N.Y.S.2d 874, 877-78 (1972) (no novelty because defendant had "envisaged" *and* "utilized" plaintiff's idea for "years before the plaintiff submitted it") *with Wetlin v. Readers Digest Ass'n Inc.*, 528 F. Supp. 451, 466 (S.D.N.Y. 1981) (even though plaintiff's idea was in public domain, no evidence that defendant knew about or would have discovered the idea except through plaintiff's proposal; hence, the "idea was novel" as far as defendant was concerned), and where substantial conflicting evidence exists as to the "novelty" of the idea under New York law, there seems to be at least a triable issue.

The majority's decision prematurely denies Murray a fair opportunity to establish his right to participate in the enormous wealth generated by *The Cosby Show*. Accordingly, I would reverse the district court judgment and remand the case for further consideration.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

HWESU S. MURRAY,

Plaintiff,

v.

NATIONAL BROADCASTING COMPANY, INC., BRANDON TARTIKOFF, THE CARSEY-WERNER COMPANY, a California partnership, MARCIA CARSEY and THOMAS WERNER,

Defendants.

No. 85 Civ. 7675 (MGC)

July 15, 1987.
(Entered July 16, 1987)

Santora & McKay, New York City, by Joseph J. Santora, Michael S. Allen, for plaintiff.

Cahill Gordon & Reindel, New York City, by Thomas R. Jones, Susan Buckley, Lisa Pearson, Ellen L. Weintraub, for defendants Nat. Broadcasting Co., Inc. and Brandon Tartikoff.

OPINION

CEDARBAUM, District Judge.

On September 30, 1985, Hwesu S. Murray ("Murray") commenced this suit against the National Broadcasting Company, Inc. ("NBC"), Brandon Tartikoff ("Tartikoff"), President of NBC Entertainment, The Carsey-Werner Co. ("Carsey-Werner"), a California corporation, and Marcia Carsey ("Carsey") and Thomas Werner ("Werner"), the principals of Carsey-Werner. The complaint alleges that defendants based the successful and lucrative weekly series The Cosby Show, on an idea that plaintiff submitted to NBC.

After the completion of discovery by all parties, defendants NBC and Tartikoff moved for summary judgment dismissing the complaint on

the ground that "plaintiff's alleged submissions lack the requisite novelty under applicable law." Defendants contend that the lack of novelty in plaintiff's idea is fatal to all of plaintiff's claims. Defendants Carsey, Werner, and Carsey-Werner joined in this motion. Following oral argument of the motion, plaintiff stipulated to dismiss his claims against defendants Carsey-Werner, Carsey and Werner.

BACKGROUND

Murray, who is black, is 36 years old. He holds a Bachelor of Arts degree in English, a Master of Arts degree in Broadcast Journalism and a law degree. For most of the past 10 years, he has worked in the television industry. (Complaint, ¶

8). In 1979, NBC hired Murray as a Unit Manager in NBC Sports. His duties include financial analysis, budget control, and other "logistical activities relating to NBC Sports programs." (Complaint, ¶ 9). In 1980, plaintiff submitted proposals to NBC for five television programs. Murray submitted the proposals after conversations with William Dannhauser, an NBC official, who requested that Murray put his proposals in writing. The five proposals were entitled "Father's Day," "Lady Luck," "Movieola," "Fox Theater Review," and "Temptations/Supremes Reunion." (Santora Affidavit, ¶ 50). Making such submissions was outside the scope of plaintiff's duties as a Unit Manager. (Complaint, ¶ 12).

Plaintiff told Dannhauser that if NBC was interested in any of the prcposals, plaintiff expected to be the executive producer and the packager for the program, and to receive proper credits and compensation as the executive producer and creator. Plaintiff also told NBC that the proposals were being submitted in confidence. (Complaint, ¶ 13). On June 27, 1980, plaintiff submitted a cover letter and a one-page proposal entitled "Father's Day" for a program about a black middle-class family. That proposal is the subject of this action.

Dannhauser was particularly interested in developing the Temptations/Supremes show. He

requested that Murray "flesh out" the other proposals and submit them to Josh Kane. At the time, Kane was an NBC Vice-President and one of the top two entertainment programming officials of NBC. (Santora Affidavit, ¶ 50). Plaintiff expanded his original proposal for "Father's Day" to two pages, and submitted the expanded proposal to Kane on November 1, 1980. In the expanded proposal, Murray suggested that Bill Cosby play the part of the father, and that Diahann Carroll play the part of Cosby's wife. He also made several other casting suggestions and included other details for the show. Following the submission of this expanded proposal, Murray made an oral

presentation to Kane setting forth some ideas that he had for the characters and for story lines. (Complaint, ¶¶ 16, 17).

On November 21, 1980, NBC, through Kane, returned the proposal to Murray, and informed him that "we are not interested in pursuing [its] development at this time." (Exhibit C to Complaint). Plaintiff's other proposals also were rejected by NBC. Plaintiff claims that NBC retained copies of his "Father's Day" submissions. (Complaint, ¶ 26). Kane left NBC before plaintiff commenced this action, and NBC no longer has any references to Murray's proposals in its files. NBC counsel sent a letter to Murray in 1985, stating that a thorough search of the files had been made,

and had produced no documents in support of plaintiff's claims.

In the fall of 1984, NBC began broadcasting The Cosby Show, starring Bill Cosby. The Cosby Show is a half-hour, weekly situation comedy series featuring an upper middle-class black family. The mother is a lawyer, and the father is a physician. Bill Cosby plays the part of the father. Plaintiff believes that The Cosby Show is derived directly from his proposal for "Father's Day." Plaintiff asserts that the concept of the show is similar. He points to the similarity of such details as the number of children in the family, the fact that the eldest child is away at college and appears only periodically, and the fact that both

parents are working professionals. Most importantly, plaintiff contends that The Cosby Show, like his proposal, is the first television series to portray an intact black family in a color-blind, nonstereotypical manner.

The Cosby Show has been an outstanding artistic and commercial success. The press has described it as a breakthrough in the industry, noting that television "has had successful comedies based on a variety of Black caricatures - 'maids, butlers, and jive-talking youngsters - but the Cosby Show breaks through the stereotypes to portray another view of the Black family: intact, successful, sensible, and funny.'" (Complaint, ¶

29, quoting The New York Times, Nov. 18, 1984).

Plaintiff claims that "solely because he is Black, and because of NBC's refusal to deal with him as a Black American, he has been denied any participation in the show" and that "if a White executive producer had proposed ["Father's Day"] that person would now be enjoying the full fruits of the tremendous success of [The Cosby Show]." (Complaint, ¶ 38).

Plaintiff has alleged numerous claims arising from NBC's appropriation of his idea, including claims of race discrimination under 42 U.S.C. § 1981 and 1982, a claim of false designation of origin under the Lanham Act, 15 U.S.C. § 1125, claims of misappropriation and

conversion, breach of implied contract, unjust enrichment and fraud. Plaintiff's "Second Cause of Action" arising under 42 U.S.C. § 1985 and his "Fourth Cause of Action" arising under RICO, have been withdrawn.

Plaintiff seeks compensatory and punitive damages, an accounting, a constructive trust for plaintiff's benefit on all profits and gross revenues realized by defendants from The Cosby Show, a declaratory judgment that Murray "is the sole owner of all rights in and to the idea, proposal and property of ... Father's Day and all exploitations thereof" (Complaint, ¶ 102(f)), and an injunction stopping the showing of The Cosby Show unless Murray

receives credit for casting and creating the show. Plaintiff also seeks interest, costs, and attorneys' fees.

In support of their motion for summary judgment, defendants assert that plaintiff has no legally protected right to an idea that is not new. Defendants contend that because plaintiff's proposal lacked novelty, all of plaintiff's claims must be dismissed.

For the reasons discussed below, defendants' motion is granted.

DISCUSSION

1. The Standard for Summary Judgment

Rule 56(c) of the Federal Rules of Civil Procedure provides that "a court shall grant a motion for summary judgment if it

determines that 'there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.'" Knight v. U.S. Fire Ins. Co., 804 F.2d 9, 11 (2d Cir. 1986), cert. denied, -- U.S.--, 107 S.Ct. 1570, 94 L.Ed.2d 762 (1987). The essential question on a motion for summary judgment is whether there is a genuine dispute about a material fact. This standard closely parallels the test for a directed verdict. If the evidence is such that a reasonable finder of fact could return a verdict for the non-moving party, summary judgment should not be granted. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986). After adequate time for

discovery, if the nonmoving party fails to make a showing sufficient to establish the existence of an element essential to its case, and on which it will bear the burden of proof at trial, summary judgment may properly be granted. In such a situation there can be no "genuine issue as to any material fact," since a failure of proof on an essential element of the case of the non-moving party "necessarily renders all other facts immaterial." Celotex Corp. v. Catrett, 477 U.S. 317, 106 S.Ct. 2548, 2553, 91 L.Ed.2d 265 (1986).

2. The "Novelty" of Plaintiff's Proposal

Both sides agree that New York law governs the central issue of whether plaintiff's idea is property subject to legal protection. Defendant argues that under New York law, the lack of novelty of an idea is fatal to any cause of action based on the use of that idea. Downey v. General Foods Corp., 31 N.Y.2d 56, 334 N.Y.S.2d 874, 286 N.E.2d 257 (1972). In Downey, the court recognized that an idea may be property if it is novel and original. But when an idea is submitted to another, "no promise to pay for its use may be implied, and no asserted agreement enfcrced, if the elements of novelty and originality are missing...." 31

N.Y.2d. at 61, 334 N.Y.S.2d. at 877, 286 N.E.2d at 259.

In Ed Graham Productions, Inc. v. National Broadcasting Co., Inc., 75 Misc.2d 334, 347 N.Y.S.2d 766 (Sup. Ct. N.Y.Co. 1973), the court summarized the law as follows:

> [W]here plaintiff's idea is wholly lacking in novelty, no cause of action in contract or tort can stand based upon the alleged misappropriation of that idea. Even if it be assumed that defendant had utilized plaintiff's idea, plaintiff may not recover if the idea was unoriginal. (Citations omitted.)

75 Misc.2d at 337, 347 N.Y.S.2d at 769. For purposes of this motion only, I have assumed that defendants used plaintiff's idea. Thus, the sole issue before me is whether the idea contained in plaintiff's "Father's Day" proposal was sufficiently novel to support a claim for its unlawful use.

In his Statement Pursuant to Local Rule 3(g), plaintiff asserts a number of facts which he contends are undisputed and establish the novelty of his proposal. First, the agreement between Carsey-Werner and NBC for The Cosby Show series provides that a failure by Carsey-Werner to perform "shall cause NBC irreparable loss of a unique, intellectual property." (3(g) Statement, ¶ D). Furthermore, at his deposition, defendant Tartikoff described The Cosby Show as "add[ing] a new and unique dimension to the American television family program genre." (3(g) Statement, ¶ H). Also, Cosby testified at his deposition "that he would agree with a description of 'The Cosby Show' as unique, novel and a breakthrough in television programming." (3(g) Statement, ¶ I).

Reviews of The Cosby Show have referred to it as "a breakthrough," a show that "breaks through the stereotypes" and "the first upper-middle class all-black family ever on TV." (3(g) Statement, ¶ J). Finally, plaintiff argues that because his proposal was based on his own life and family, it is necessarily novel. (3(g) Statement, ¶ C).

As discussed briefly above, plaintiff's "Father's Day" proposal contained an idea for a half-hour weekly series centering on a black, middle-class American family. Plaintiff first submitted a cover letter addressed to William Dannhauser and a one-page written proposal describing his idea for the program. Because the details of plaintiff's idea are essential to a decision on its novelty,

the substantive portions of the first proposal are set out in their entirety:

> The leading character will be the father, a 45-year-old attorney in private practice who is a devoted family man and a compassionate proud, authority figure. The mother, loving and supportive, is a county administrative worker who finds joy in striking a balance between her family and her work. The family includes four children; a son, 14, a daughter, 7, a second daughter, 4; and an infant son. The family's eldest son, 20, is a scholar of a distant college and is preparing for law school. He makes only periodic appearances, but his life has continuing impact upon his family at home.
>
> The family lives in a home located in a suburb of a major city. This program adds a new and unique dimension to the American television family program genre. It is not a situation comedy per se. While humor may be a factor on occasion, it is not essential to the main focus of the program.
>
> The characters are real people in real life situations, striving for personal achievement. The program may well resemble "Father Knows

> Best" and "The Dick Van Dyke Show." It will be radically different from "The Jeffersons," "Good Times," "Different Strokes," and "That's My Mama." The father will not be a buffoon, a supermasculine menial, or a phantom. Children will not engage in eyerolling "sassiness," or abusive anti-social behavior. The mother will be neither a heavy-set cleaning woman, nor a struggling person without purpose or direction. In short, the characters will present various human personalities. The program will show how a Black father can respond with love to something as mundane as a Father's Day card, and will present a closely-knit family and who [sic] how much they care for and support one another (which was the strong quality of "Roots".)

Plaintiff submitted his expanded proposal for "Father's Day" on November 1, 1980. This proposal did not add significant details to plaintiff's original proposal except that it suggested casting for the show. Plaintiff proposed that Bill Cosby should play the role of the father and

Diahann Carroll the role of the mother. He suggested actors for several of the supporting roles as well. Plaintiff also wrote that:

> A recurring element of this program will involve situations in which the father's traditional views of success and the roles of fathers, mothers, and children are challenged by a new set of rules and ideas. For example, the father is continuously upset by the rapid decline of the value of the dollar, particularly in light of his many years of struggle to achieve middle-class status. He is also disgruntled about the decline of educational values and the rise of the drug culture which surrounds his children, in their integrated, middle-class environment. With tongue-in-cheek humor, he re-evaluates middle-class American life, with a Black prospective, and adjusts his perception of the American dream in light of new realities.

To the extent that plaintiff's proposed program "may well resemble 'Father Knows Best' and 'The Dick Van

Dyke Show,'" it cannot be considered novel. An idea for a family situation comedy involving a white family would certainly not have been novel in 1980 since all of the networks had already run numerous variations on this theme. Plaintiff's assertion of novelty rests on the fact that the family to be portrayed in his proposed program was black. It is this characteristic which plaintiff emphasizes as the factor that makes his idea novel and legally protectable. Plaintiff stated in his Affidavit in opposition to defendants' motion:

> When I created "Father's Day", I had in mind to create a show that was new and unique and would portray a Black family as it had never been shown before on television .... I also had, as a Black man, a strong desire to produce a show with strong and positive role models for the

> Black community, and to make a statement regarding the love and integrity of the Black family to the world. I think every Black person in this country knows there has been a need for this, and that never before on television had there been a portrayal of a Black family as I created it for "Father's Day."
>
> An essential element of "Father's Day" was the lead role for the male, a person of great strength and character, who was the predominant figure in the family. No one can dispute the need for such a positive role model for Black males prior to "Father's Day."

(Murray Affidavit, ¶¶.10, 11).

The question presented in this case is therefore a narrow one: whether the proposed use of a black family made "Father's Day " such a novel and original conception that it transformed a common and frequently utilized formula for family situation comedies into an idea entitled to legal protection.

Two factors preclude a finding that plaintiff's idea was sufficiently novel to be entitled to protection. First, plaintiff's proposal merely combined two ideas which had been circulating in the industry for a number of years - namely, the family situation comedy, which was a standard formula, and the casting of black actors in non-stereotypical roles, for which the television industry recognized a need. To a limited extent, the networks had already cast black actors in non-stereotypical roles.

The second factor precluding a finding of novelty in this case is that The Cosby Show is closely related to television programs with which Bill Cosby has been associated in the past. In fact, in 1965, Cosby himself publicly expressed his desire to

develop a television series depicting a middle-class black family.

A. Prior Network Programs

In opposition to defendants' motion, plaintiff submitted an affidavit of J. Fred MacDonald, a professor of history at Northeastern Illinois University in Chicago. MacDonald's work has focused on "the portrayal and treatment of Afro-Americans (or Black Americans), both in front of and behind the camera, by the television industry." (Affidavit, ¶ 1). In view of plaintiff's heavy reliance on MacDonald as an expert on the history of the television industry, I have carefully examined MacDonald's analysis and the descriptions of prior television programs contained in his book, Blacks and White TV: Afro-Americans in Television since 1948

("Blacks and White TV"). (Exhibit E to Murray Affidavit).

Professor MacDonald states in his Affidavit that "I consider 'The Cosby Show' a radical break with the racist traditions of past portrayals of Blacks on television." (¶ 8). But MacDonald's own book describes a number of earlier television shows featuring black actors. All of these television programs predated The Cosby Show.

MacDonald's book shows that Bill Cosby was the first black actor to star in a prime time television series on a major network. Cosby played Alexander Scott in the dramatic series I Spy from 1965 to 1968:

> Casting Cosby as Alexander Scott, the tennis trainer and traveling companion of [Robert] Culp's character, fellow agent Kelly Robinson, broke the color

> line as had no series in TV history.
>
> ....
>
> As well as being the first network drama with an Afro-American star, I Spy was a landmark program for blacks in other respects. Alexander Scott was placed solidly beyond the borders of the United States, swept up in the dynamics of world affairs....
>
> Cosby's character ... was unlike Shaft, Superfly, and other exaggerated "superspade" characters developed in the so-called blaxploitation films of the next decade. Alexander Scott was a real, mature human character - able to feel and express emotions historically forbidden to black characters in mainstream entertainment media.

Blacks and White TV at 110-111.

According to MacDonald, the series Julia, starring Diahann Carroll, which was broadcast from 1968-1971, centered on self-supporting professional nurse who lived in a racially integrated apartment

building. She was a "war widow" raising a son and "was the most assimilated black character ever to appear in the American mass media." Blacks and White TV at 115. As far as the show itself was concerned:

> Julia made no pretense of dealing with contemporary social issues. Indeed, it studiously avoided them. A weekly visit with the Bakers involved the same simple problems encountered for decades on such shows as I Love Lucy, Family Affair, and the Donna Reed Show.

Id. at 115.

MacDonald points out that the show was criticized for a number of reasons, including its unrealistic depiction of a black woman, the fact that the lead character was "female and husbandless" and that the program as a whole seemed patronizing to Blacks. Id. at 117. These criticisms notwithstanding, Julia was a series

which portrayed a black woman facing the everyday, mundane problems dealt with in countless other television series. To that extent, it was very similar to Murray's proposal to portray black characters as "real people in real life situations, striving for personal achievement." (Murray proposal).

MacDonald also discusses Room 222, which was broadcast by ABC from 1969-1974. Room 222 featured Lloyd Haynes, a black actor, as a history teacher at an integrated high school. MacDonald summarized the program as follows:

> The sympathetic characters portrayed by Haynes and [Denise] Nicholas [a black actor who played a school guidance counselor] represented a positive statement about black middle-class success. In charge of young lives, here were

> responsible black adults making all the right moves....
>
> The professionals in Room 222 had achieved. They were laboring now so that black youngsters could follow them to the American Dream....
> Not simply principals in a TV series, these were role models of what 'the good life' - a world of rational thought, attractive people, and financial sufficiency -offered for those who would abandon bitterness and work to overcome within the system.

Blacks and White TV at 129.

Another television series discussed by MacDonald, the Bill Cosby Show, ran from 1969-1971 and featured Cosby as the lead character, Chet Kincaid, a high school track coach who was "middle-class, professional, and educated." Id. at 117. MacDonald described the Bill Cosby Show in part, as follows:

> [T]he series was a statement about black life, an endorsement of the middle-class, educated black man who has not deserted the ghetto but moves gracefully between both worlds. Through his character, Cosby served to defang the contemporary familiar image of riotous blacks. He also suggested to blacks still in poverty that they were not forgotten by those who had obtained an education and credentials to operate in the wider, primarily white society.

Id. at 118.

Another show created by Cosby was Fat Albert and the Cosby Kids, an animated Saturday morning program which was first shown on television in the fall of 1972. MacDonald described this program as follows:

> [T]his animated Saturday morning series featured Bill Cosby as host to the adventures of a group of black youngsters growing up in an urban environment. The show was drawn in part from Cosby's memories of his own childhood in Philadelphia....

> Working with a panel of social scientists and educators, CBS and Cosby used the program as a vehicle for teaching ethics, social values, judgment, and personal responsibility. Here was a fusion of education and entertainment, precipitated for the most part by Cosby....
>
> As well as presenting black characters in a positive perspective, Fat Albert treated issues such as lying, tolerance, coping with death in the family, playing hooky, cheating on tests, and ganging up on a child because he or she is different.

Id. at 195.

MacDonald's book also discusses Barefoot in the Park, a television series which was first shown in the Fall of 1969, and lasted for only thirteen weeks. Based on Neil Simon's hit Broadway play and movie, the series depicted a young middle-class black couple living in New York City and their struggles during the first years

of marriage:

> [T]he comedy in the series was uninspired, and the image of an attractive young couple kissing and joking their way through married life was already an over-used format.

Id. at 119. It is difficult to understand why, apart from their relative success, a show featuring a young black middle-class couple, apparently for the first time, would be considered "an over-used format," while a program based on the life of a middle-class black family and resembling the Dick Van Dyke Show or Father Knows Best should be considered novel.

Although plaintiff is correct that some of the cases on which defendants rely are factually distinguishable because they involved trade and advertising proposals rather than creative works, the legal

principles they embody are not limited to trade cases.

In McGhan v. Ebersol, 608 F. Supp. 277 (S.D.N.Y. 1985), plaintiff sued for violation of a joint venture agreement and misappropriation of ideas in connection with a television series, "Friday Night Video," a music video show broadcast on NBC on Friday evenings. Defendant moved for summary judgment on the ground, inter alia, that the plaintiff's proposals for the program were not sufficiently original to allow the plaintiff to assert a protected interest.

The court reasoned that in order to succeed on his claim of misappropriation, plaintiff would have to establish two essential elements: a legal relationship between the parties and a novel and concrete idea. Id. at

284. The court held that although a question of fact existed as to the legal relationship between the parties, the plaintiff had failed to prove that the ideas for which he sought compensation "were both novel and concrete." Id. at 285. The court rejected a number of plaintiff's claimed ideas on the ground that

> While it is true that the fact that a plaintiff's idea 'embodies elements long in use does not of itself negate originality or novelty,' Baut v. Pethick Const. Co., 262 F. Supp. 350, 361 (M.D. Pa. 1966), in order to be protectable, adaptations of ideas must:
>
> > show genuine novelty and invention, and not a merely clever or useful adaptation of existing knowledge ... [t]he judicious use of existing means or the mixture of known ingredients in somewhat different proportions - all the variations on a basic theme - partake more of the nature of elaboration and

> renovation than of innovation. Educational Sales Programs, Inc. v . Dreyfus Corp., supra, [65 Misc.2d 412,] 317 N.Y.S.2d [840] at 844.

Id. at 286.

In his proposal for "Father's Day," plaintiff took already existing ingredients from the basic theme of the family situation comedy. If plaintiff's submission in 1980, which was expressly rejected by NBC in November of 1980, were to be considered novel, it would mean that defendants would be barred from televising a family situation comedy starring Bill Cosby, if the family is an intact family unit. See, e.g., Soule v. Bon Ami, 201 A.D. 794, 195 N.Y.S. 574 (2d Dep't 1922), aff'd, 235 N.Y. 609, 139 N.E. 754 (1923); see also Educational Sales Programs, Inc.

v. Dreyfus Corp., 65 Misc.2d 412, 416, 317 N.Y.S.2d 840 (Sup.Ct. N.Y.Co. 1970) ("One cannot be forever barred from using a worthwhile but unoriginal idea merely because it was once asked to be treated in confidence.").

B. Bill Cosby's Previous Work

The other major impediment to a finding that plaintiff's idea was sufficiently novel to constitute property is that Cosby himself had previously proposed an idea which was very similar to the core of plaintiff's proposal.

In an interview which appeared in the New York Sunday News on December 12, 1965, Cosby discussed his ideal television series:

> It won't be unlike other situation comedies. There'll be the usual humorous exchanges between husband and wife in the style made famous by Dick Van

> Dyke and Mary Tyler Moore. Warmth and domestic cheerfulness will pervade the entire program. Everything on the screen will be familiar to TV viewers. But this series will be radically different. Everyone in it will be a Negro.
>
> ....
>
> Bill seeks to initiate the all-Negro series for one specific reason: "I'm interested in proving there's no difference between people. My series would take place in a middle-income Negro neighborhood. People who really don't know Negroes would find on this show that they're just like everyone else. There would be no Negro jokes on my series, or attempts to sway people to move into segregated neighborhoods. The show would be my personal answer to bigots who regard Negroes as animals and not human beings."

(Exhibit 1 to Jones' Affidavit).

The history of Cosby's television career argues strongly against the novelty of Murray's proposal. In support of their motion for summary judgment, defendants submitted two

videotapes: one, the initial episode of The Cosby Show, the other, a sampling of Cosby's prior work in television and his recordings. What is apparent from this material is that themes of parenting, parent-child relations, and child behavior have pervaded Cosby's work in all media. In virtually every project in which Cosby has been involved, he has applied the ideas of black family and non-stereotypical black characters.

The fact that plaintiff himself proposed to cast Bill Cosby as the central character in his program is further evidence that Cosby is connected - even in plaintiff's mind - with the concept that plaintiff seeks to monopolize. At plaintiff's deposition, he pointed out how important Cosby was to his proposal

because Cosby was "known as a very funny person" and "would bring to the program the kinds of elements that I wanted to project." (Murray deposition at 328). "In addition to Mr. Cosby's popularity, part of what he had been doing for a living was standup comedy in which he was giving anecdotes about his childhood past and childhood experiences and also stories about his own family, his own wife and children." (Id. at 328). In discussing the sources for his proposal, Murray stated that:

> [T]he basis of this program is my life as a father based on my experiences as a child and husband and father and that these were kinds of things that I wanted to bring to this show. I felt that Mr. Cosby's experiences were things that were public knowledge, so that the success of the show would be a combination of his qualifications based on what the

> public knew of him and the things that I had created.

(Id. at 331).

When plaintiff's proposal is viewed in light of Cosby's own work and career, and of the progression of programs featuring black actors that went before The Cosby Show, plaintiff's idea cannot be considered sufficiently novel to create a property interest.

3. The Effect on Plaintiff's Claims of Plaintiff's Failure to Establish Novelty.

A. Plaintiff's Intellectual Property Claims

Plaintiff's Fifth, Sixth and Seventh "Causes of Action" relate to defendants' allegedly unlawful use of plaintiff's idea. Plaintiff's "Fifth Cause of Action" is for misappropriation and conversion of his

idea. In his "Sixth Cause of Action," which is against NBC only, plaintiff claims that NBC "breached its implied agreement with plaintiff and its confidential relationship with plaintiff." (Complaint, ¶ 85). Plaintiff's "Seventh Cause of Action" is for unjust enrichment.

Lack of novelty is fatal to all of these claims. Unless an idea is novel, it does not constitute property, and recovery cannot be obtained for its unlawful use. See Downey v. General Foods Corp., 31 N.Y.2d 56, 61, 334 N.Y.S.2d 874, 286 N.E.2d 257 (1972) (If an idea is not novel, "no promise to pay for its use may be implied, and no asserted agreement enforced."); see also Lehman v. Dow Jones & Co., Inc., 783 F.2d 285, 300 (2d Cir. 1985)

(quoting Downey); Ed Graham Productions, Inc. v. National Broadcasting Company, Inc., 75 Misc.2d 334, 336 (Sup.Ct. N.Y.Co. 1973) (lack of novelty in plaintiff's proposal for a cartoon series precluded a finding that it was exclusive property capable of protection).

Moreover, with respect to plaintiff's cause of action for breach of an implied contract, "[a] contract cannot be implied in fact where the facts are inconsistent with its existence; or against the declaration of the party to be charged.... The assent of the person to be charged is necessary and unless he has conducted himself in such a manner that his assent may fairly be inferred he had not contracted." Miller v. Schloss,

218 N.Y. 400, 406, 407, 113 N.E. 337 (1916) (citations omitted). The facts in this case do not support a finding of an intent to contract. On the contrary, the complaint alleges NBC's express rejection of plaintiff's proposal. (Complaint, ¶ 25).

In addition, unjust enrichment, or an implied contract in law, "rests upon the equitable principle that a person shall not be allowed to enrich himself unjustly at the expense of another." 218 N.Y. at 407, 113 N.E. at 339. Defendants cannot have enriched themselves at the expense of the plaintiff since plaintiff had nothing of value to confer. See, e.g., Educational Sales Programs, Inc. v. Dreyfus, 65 Misc.2d 412, 415, 317 N.Y.S.2d 840 (Sup. Ct. N.Y.Co. 1970).

B. Plaintiff's Section 1981 Claims

Plaintiff's "First Cause of Action" based on defendants' alleged deprivation of plaintiff's "right to make and enforce contracts" must also fail because plaintiff is unable to establish that his "idea and proposal for 'Father's Day' was novel, original and concrete." (Complaint, ¶ 45). Plaintiff's claim under 42 U.S.C. § 1981 is based on the premise that his idea constituted property for which he could contract. In view of the idea's lack of novelty, plaintiff has no property right to assert, or of which he could have been deprived.

C. Plaintiff's Lanham Act Claim

Plaintiff's "Third Cause of Action" alleges that defendants failed to designate him as the creator and/or

originator and the casting person of The Cosby Show. (Complaint, ¶ 63). Lack of novelty is fatal to this claim as well. Because the idea was not novel, it must be considered to have been in the public domain and, therefore, not attributable to any one individual.

D. Plaintiff's Fraud Claim

Plaintiff's "Eighth Cause of Action," against NBC only, sounds in fraud. Plaintiff alleges that NBC concealed its interest in "Father's Day" and the development of The Cosby Show, and misrepresented its interest in plaintiff's proposal. This claim also cannot survive in view of plaintiff's failure to establish that his idea was novel. Plaintiff alleges that defendant's fraudulent acts "included its conversion of plaintiff's

property, breaches of implied contract and its confidential relationship with plaintiff" (Complaint, ¶ 95). These are the same grievances asserted in the Fifth and Sixth causes of action, and cannot succeed for the same reason. Plaintiff cannot be defrauded of property that he does not own.

CONCLUSION

For the reasons discussed above, plaintiff cannot establish an essential element of all of his claims. Therefore, defendants' motion for summary judgment is granted.

SO ORDERED.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK x

HWESU S. MURRAY.

Plaintiff.

85 Civ. 7675
(MGC)

-against- JUDGMENT

NATIONAL BROADCASTING COMPANY, INC., BRANDON TARTIKOFF, THE CARSEY-WERNER COMPANY, a California partnership, MARCIA CARSEY and THOMAS WERNER,

Defendants.

x

Defendants "NBC" and "Tartikoff" having moved for summary judgment and the said motion having come before the Honorable Miriam Goldman Cedarbaum, U.S.D.J., and the Court thereafter on July 16, 1987, having handed down its opinion (#61268), granting defendant's motion for summary judgment, it is,

ORDERED, ADJUDGED AND DECREED:

That the complaint be and it is hereby dismissed as to defendants "NBC" and "Tartikoff".

DATED: NEW YORK, N.Y.

July 22, 1987

Raymond F. Burghardt

Clerk

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 18th day of April one thousand nine hundred and eighty-eight.

Present: Hon. RALPH K. WINTER,
Hon. GEORGE C. PRATT,
Hon. FRANK X. ALTIMARI,

Circuit Judges,

HWESU S. MURRAY,
Plaintiff-Appellant,

Docket
No.87-7695

-v-

NATIONAL BROADCASTING
COMPANY, INC. and
BRANDON TARTIKOFF,
Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the ORDER of said District Court be and it hereby is affirmed in accordance with the opinion of this court with costs to be taxed against the appellant.

Elaine B. Goldsmith,
Clerk

By: EDWARD J. GUARDARO,
Deputy Clerk

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 1st. day of June one thousand nine hundred and eighty-eight

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HWESU S. MURRAY,
Plaintiff-Appellant,

-v-

NATIONAL BROADCASTING COMPANY, INC.,
BRANDON TARTIKOFF,
THE CARSEY-WERNER COMPANY, a California partnership,
MARCIA CARSEY and THOMAS WERNER,
Defendants.

NATIONAL BROADCASTING COMPANY, INC. and
BRANDON TARTIKOFF,
Defendants-Appellees.

Docket No. 87-7695

A petition for rehearing containing a suggestion that the action be heard in banc having been filed herein by counsel for the Appellant MURRAY.

Upon Consideration by the panel that heard the appeal, it is Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

Elaine B. Goldsmith
Clerk

Supreme Court, U.S.
FILED
OCT 26 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-375

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

HWESU S. MURRAY,

Petitioner,

—against—

NATIONAL BROADCASTING COMPANY, INC.
and BRANDON TARTIKOFF,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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19 pp

QUESTIONS PRESENTED

The issues before this Court are:

1) Whether the court below erred in finding that there were no material issues of fact in dispute as to the lack of novelty of petitioner's idea under controlling New York law.

2) Whether the court below erred in affirming the dismissal of the various causes of action alleged in the complaint, having properly found that petitioner's idea was not novel, and accordingly not protectible under New York law.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-375

HWESU S. MURRAY,

Petitioner,

—against—

NATIONAL BROADCASTING COMPANY, INC.
and BRANDON TARTIKOFF,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

Respondents National Broadcasting Company, Inc. ("NBC")[1] and Brandon Tartikoff respectfully submit that a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit entered on April 18, 1988 (rehearing and rehearing *en banc* denied, June 1, 1988), should not issue because no question worthy of the exercise of the Court's certiorari jurisdiction is presented and because the decision below is in all respects correct.

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1 Pursuant to Rule 28.1, NBC advises the Court that NBC is a wholly owned subsidiary of National Broadcasting Company Holding, Inc. which is a wholly owned subsidiary of General Electric Company. NBC has no affiliates or subsidiaries other than wholly owned subsidiaries.

STATEMENT OF THE CASE

Petitioner Hwesu S. Murray, an NBC sports division financial manager, claims that NBC and its entertainment division president, Brandon Tartikoff, misappropriated an idea submitted by Murray to NBC personnel in 1980. Four years later, Murray alleges, his idea appeared as the critically acclaimed and financially successful *The Cosby Show* which premiered in the fall of 1984.

The complaint, filed in October, 1985, alleged misappropriation, fraud, conversion, unjust enrichment, breach of implied contract, civil RICO violations,[2] and Lanham Act violations. In addition, the complaint alleged violations of petitioner's civil rights claiming that Murray, a black American, would have successfully marketed his submission to NBC and entered into a contract with NBC as Executive Producer of the program had it not been for his race.[3] Murray sought an injunction against broadcast of *The Cosby Show*, a declaration that he is the program's owner, an accounting of profits, and $20 million in compensatory and punitive damages. Notably, petitioner did not sue for copyright infringement under the federal copyright statute, but rather for theft of an "idea" under the common law of New York.

It is neither procedurally appropriate, nor possible within the context of this brief in opposition, to combat each of the many misstatements of fact, distortions of the record and mischaracterizations of the parties' positions contained throughout the petition. Instead, respondents rely upon, and incorporate by

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2 The civil RICO claim was withdrawn by Murray at the urging of the District Court. P. App. 33a. References to "P. App." are to the appendix to the Petition for a Writ of Certiorari.

3 The Carsey-Werner Company ("Carsey-Werner"), in association with Bill Cosby, produces *The Cosby Show* and is the copyright holder. NBC is the exclusive licensee for network broadcast. Carsey-Werner, together with its principals, Marcia Carsey and Thomas Werner, were named as defendants, but were dismissed from the action at the urging of the District Court after the filing of their summary judgment motion. P. App. 25a. Petitioner's claims under 42 U.S.C. § 1985(3) (1982) were also then withdrawn. P. App. 33a.

reference, the factual expositions of the Court of Appeals (P. App. 2a-14a) and the District Court (P. App. 25a-34a) both of which assumed, for the purposes of the motion for summary judgment, the truth of the allegations of the complaint.

It is sufficient for present purposes to state that there is absolutely no evidence of any misappropriation by NBC or Tartikoff, no evidence of actual access by any person involved with the creation of *The Cosby Show*, and no evidence of discriminatory conduct. It is equally clear that all of this is irrelevant to the issue before the Court. Respondents moved for and were granted summary judgment on a single, narrow ground: that petitioner's proposal did not contain any material sufficiently novel to warrant protection under the New York law of intellectual property. That being so, as the New York Court of Appeals has made perfectly clear, " '[l]ack of novelty in an idea is fatal to any cause of action for its unlawful use.' " *Downey* v. *General Foods Corp.*, 31 N.Y.2d 56, 61, 286 N.E.2d 257, 259, 334 N.Y.S.2d 874, 877 (1972) (quoting *Bram* v. *Dannon Milk Products, Inc.*, 33 A.D.2d 1010, 307 N.Y.S.2d 571 (1st Dep't 1970)).

Respondents' motion before the District Court was based upon a simple comparison between Murray's three-page concept and scores of television programs, including Bill Cosby's own, many examples of Bill Cosby's other signature comedic materials, performed over fifteen years, and, perhaps most notably, statements by Bill Cosby himself dating back to 1965, setting forth the very same concept that Murray submitted in 1980. P. App. 2a-3a; 46a-47a.

Petitioner proposed a family situation comedy, depicting a non-stereotyped black family, featuring a father, mother and five children. J. App. 40a, 42a-43a.[4] Petitioner explained that his proposal "may well resemble *Father Knows Best* and *The Dick Van Dyke Show*." P. App. 41a-42a. According to Murray, "[t]he program derives its humor from three principal

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4 Despite Murray's claim that he based his idea on his own life, the similarities with Bill Cosby's life are unmistakable. P. App. 62a. Bill Cosby, in fact, has five children. References to "J. App." are to the Joint Appendix filed with the Court of Appeals.

sources: Bill Cosby's talent; the talent of the supporting cast; and, humorous situations at the home and the office." J. App. 42a.

Strikingly, in 1965, after the success of *I Spy*—NBC's dramatic series which featured Bill Cosby in TV's first major non-stereotyped "color-blind" role—Cosby described the series "I really have my heart set on doing." "It won't be unlike other situation comedies," *The New York Sunday News* reported,

> There'll be the usual humorous exchanges between husband and wife in the style made famous by *Dick Van Dyke* and *Mary Tyler Moore*. Warmth and domestic cheerfulness will pervade the entire program.
>
> Everything on the screen will be familiar to TV viewers. But this series will be radically different. Everyone in it will be a Negro.
>
> * * *
>
> Bill seeks to initiate the all-Negro series for one specific reason: "I'm interested in proving there's no difference between people. My series would take place in a middle-income Negro neighborhood. People who really don't know Negroes would find on this show that they're just like everyone else."[5]

This concept, articulated so simply by Bill Cosby, is consistent with his entire career as an entertainer. For more than twenty years, his family has supplied the raw material for his comedic routines and public appearances on television, in night clubs, on stage and on record albums. His signature comedic trademark, in all forms of entertainment media, has long been his portrayal of everyday family situations in a humorous, "color-blind" way. P. App. 59a-62a.

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5 Lardine, "Looking to the Future: Bill Cosby Has Dreams of an All-Negro TV Series," *New York Sunday News*, September 19, 1965, Magazine, p. 6. P. App. 2a-3a. Cosby also reiterated this theme in several interviews in the late 1960's. J. App. 100a-106a.

The District Court pointed to Bill Cosby's lifetime work, as well as to many other network television situation comedies in which racial stereotypes were avoided, many of which were presented by petitioner's own expert, Dr. J. Fred MacDonald, in his book, *Blacks and White TV: Afro-Americans in Television since 1948* (1985). P. App. 47a-55a, 59a-63a. Thus, the District Court concluded:

> Two factors preclude a finding that plaintiff's idea was sufficiently novel to be entitled to protection. First, plaintiff's proposal merely combined two ideas which had been circulating in the industry for a number of years—namely, the family situation comedy, which was a standard formula, and the casting of black actors in non-stereotypical roles, for which the television industry recognized a need. To a limited extent, the networks had already cast black actors in non-stereotypical roles.
>
> The second factor precluding a finding of novelty in this case is that *The Cosby Show* is closely related to television programs with which Bill Cosby has been associated in the past. In fact, in 1965, Cosby himself publicly expressed his desire to develop a television series depicting a middle-class black family.

P. App. 46a-47a.

Having properly determined that petitioner's idea was not novel, and thus not protectible under New York law, the District Court considered each of the claims and properly found that, lacking the underpinning of a protectible right under New York law, either in tort or contract, none of the claims could stand.

In affirming the judgment of the District Court, the Court of Appeals wrote:

> Our review of New York intellectual property law leads us to the inescapable conclusion that the district court did not err in deciding that there was no material issue of fact as to the novelty of plaintiff's proposal. In our judgment, the basic premise underlying the concept of novelty under

> New York law is that special protection is afforded only to truly innovative ideas while allowing the free use of ideas that are "merely clever or useful adaptation[s] of existing knowledge." In this case, the record indicates that plaintiff's idea for a situation comedy featuring the nonstereotypical portrayal of a black family simply was not uniquely plaintiff's creation.

P. App. 18a (citation omitted).

On June 1, 1988 Murray's petition for rehearing was denied; his suggestion for rehearing *en banc* was also denied, no judge of the Court of Appeals having requested that a vote on rehearing be taken. P. App. 75a.

ARGUMENT

NONE OF THE ISSUES RAISED BY PETITIONER WARRANTS REVIEW BY THIS COURT

The petition is little more than a thinly veiled attempt to reargue Murray's dissatisfaction with New York's intellectual property law. Knowing that a reconsideration of the state law issue in this Court is unlikely, Murray has fallen back on the time-honored catch-phrases: "creates a conflict in the Circuits," "disregards decisions of this Court," "violates constitutional rights." But here there is no substance behind the words. There are no conflicting circuit court opinions, no violation of constitutional principles and no substantial federal questions. Indeed, there is no demonstrable error.

None of the issues posed by the petition merits this Court's consideration. Murray's disagreement with New York law—despite his attempts to "federalize" it—is not an appropriate ground on which to seek this Court's review. The suggestion that the Court of Appeals engrafted a property requirement onto 42 U.S.C. § 1981 is simply erroneous. The Second Circuit specifically and expressly did not do so. The argument that the courts below resolved inferences against him and disregarded material facts in concluding that there was no material question

of fact as to the novelty of his proposal is factually untrue; in any event neither of the courts below disregarded this Court's plainly articulated summary judgment standards. The notion that the Second Circuit denied him due process, presumably because its denial of his appeal was arbitrary and capricious, is a claim obviously born more of frustration than of legal reasoning or precedent. Even a cursory examination of each of these claims demonstrates the lack of basis for the granting of a writ of certiorari.

A. The Second Circuit's Application of Well-Established Principles of New York Law Raises No Issue Worthy of this Court's Consideration

Although he attempts to disguise it, most of Murray's arguments are simply an attempt to reargue the novelty law of New York. But the law of New York is indisputable and clear.

The cornerstone of New York law is *Downey* v. *General Foods Corp.*, 31 N.Y.2d 56, 61, 286 N.E.2d 257, 259, 334 N.Y.S.2d 874, 877 (1972), where the New York Court of Appeals, in affirming dismissal of a variety of tort and contract claims stemming from a claim of idea theft, wrote:

> An idea may be a property right. But, when one submits an idea to another, no promise to pay for its use may be implied, and no asserted agreement enforced, if the elements of novelty and originality are absent, since the property right in an idea is based upon these two elements.

Id. (citations omitted).

The oft-quoted New York standard for novelty is expressed as follows: To be novel,

> [an] idea need not reflect the "flash of genius," but it must show genuine novelty and invention, and not a merely clever or useful adaptation of existing knowledge. Improvement of standard technique or quality, the judicious use of existing means, or the mixture of known ingredients in somewhat different proportions—all the

> variations on a basic theme—partake more of the nature of elaboration and renovation than of innovation.

Educational Sales Programs, Inc. v. *Dreyfus Corp.*, 65 Misc. 2d 412, 416, 317 N.Y.S.2d 840, 844 (Sup. Ct. N.Y. Co. 1970) (citations omitted).[6]

New York law allows neither a tort action nor an enforceable contract, express or implied, if the underlying idea is not novel, since such an idea is "in the public domain and may freely be used by anyone with impunity." *Ed Graham Productions, Inc.* v. *National Broadcasting Co.*, 75 Misc. 2d 334, 337, 347 N.Y.S.2d 766, 769 (Sup. Ct. N.Y. Co. 1973). The courts below properly applied controlling New York law in dismissing petitioner's common law claims;[7] their dismissal raises no question warranting this Court's review.

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6 In a strained attempt to identify a split in the circuits, Murray cites to *Official Airline Schedule Information Service, Inc.* v. *Eastern Airlines Inc.*, 333 F.2d 672, 675 (5th Cir. 1964) for the proposition that New York's novelty requirement is only applied to unsolicited ideas, in contrast to the Second Circuit's holding in this case. Murray's reference to Judge Rives's concurring opinion does no more than establish that New York's novelty law applies to unsolicited idea submissions. It does not stand for the proposition that solicited submissions need not be novel under New York law and as such creates no conflict with the Second Circuit. In any event, even if there were a conflict between the Fifth and Second Circuits on an issue of New York law, which there is not, such a conflict is not the type that warrants the exercise of this Court's certiorari jurisdiction.

7 Petitioner's attempt to dress his intellectual property claim as a claim for conversion was also properly dismissed by the courts below. To the extent that the claim was premised on the unsupported allegation that his proposal had been copied by NBC before being returned to him, such a claim "constitutes far too insubstantial an interference with property rights to demonstrate conversion." *Harper & Row, Publishers, Inc.* v. *Nation Enterprises*, 723 F.2d 195, 201 (2d Cir. 1983), *rev'd on other grounds*, 471 U.S. 539 (1985). To the extent petitioner predicated his conversion claim on the use of the contents of the documents, the right he sought to protect is coextensive with an exclusive

B. The Second Circuit Properly Affirmed the Dismissal of Petitioner's Civil Rights Claims

The Second Circuit did not, as Murray pretends, merge 42 U.S.C. §§ 1981 and 1982,[8] nor did it attempt to "repeal" section 1981. Rather, the Court of Appeals explicitly "agree[d] with plaintiff that section 1981 does not speak in terms of property," citing *Runyon* v. *McCrary*, 427 U.S. 160, 170-71 (1976) (P. App. 16a), the very authority petitioner incomprehensibly claims the court disregarded. Petition at 25, 27. Having found that petitioner's proposal was not novel, the court below properly concluded that Murray has no cognizable civil rights claim under section 1981. Murray's argument that a "property" standard has been incorporated confuses "property" with "consideration."

Section 1981 creates no substantive rights. While the statute guarantees an *equal* right to contract, there must be an underlying contract right upon which to base a section 1981 claim:

> On a claim under § 1981, a plaintiff must show *both* that he was subjected to intentional discrimination, and *that this discrimination interfered with a contractual relationship.*

Krulik v. *Board of Education*, 781 F.2d 15, 23 (2d Cir. 1986) (emphasis added; citations omitted).[9]

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right protected by the Copyright Act. "As such, [his] conversion claim is necessarily preempted" under 17 U.S.C. § 301 (1982). *Harper & Row, Publishers, Inc.* v. *Nation Enterprises*, 723 F.2d at 201. *Accord Quincy Cablesystems, Inc.* v. *Sully's Bar, Inc.*, 650 F. Supp. 838, 849-50 (D. Mass. 1986).

8 Apart from his general disagreement with the application of New York's novelty law, petitioner does not otherwise contest the dismissal of his claim under § 1982; nor does he appear to dispute the dismissal of his Lanham Act claim.

9 Murray's unsupported assertion that federal and not state law applies to the contract is simply not correct. There is no federal law of contracts as such. Murray's fear that discrimination would mean dif-

As the Second Circuit recognized:

> Given the lack of novelty in plaintiff's idea there could be no *consideration* for the alleged promise and hence no enforceable contract right upon which to base a section 1981 claim.

P. App. 17a (citations omitted; emphasis added).

Petitioner offered to respondents something of no legal value—an idea already in the public domain, indeed one that was put forward fifteen years earlier by the distinguished actor and comedian who would later star in the series and be rightfully credited for its success. Accordingly, petitioner's claim does not rise to the level of a civil rights violation. "Section 1981 is by its very terms . . . not an affirmative action program. It is an equalizing provision seeking to ensure that rights do not vary according to race." *Long* v. *Ford Motor Co.*, 496 F.2d 500, 505 (6th Cir. 1974). A white person who approaches NBC with a non-novel idea has no right to force a contract upon the network. Petitioner has no greater right because he is black.[10]

C. The Second Circuit Properly Applied the Summary Judgment Standard

Murray's arguments that the Second Circuit failed to apply the proper standard in reviewing a motion for summary judg-

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ferent things in different states is also unfounded. Section 1981 gives a black person equal rights, but no more rights, than a white person; where a white person has no contract rights under applicable state law, a black person has none greater. *See generally* Congressional Globe, 41st Cong., 2d Sess. 3883 (May 27, 1870) (remarks of Rep. Bingham).

10 In another attempt to manufacture a conflict among the circuits, Murray cites the Fifth Circuit's decision in *Gonzalez* v. *Southern Methodist University*, 536 F.2d 1071 (5th Cir. 1976), *cert. denied*, 430 U.S. 987 (1977) for the proposition that the "absence of a § 1982 claim does *not* preclude a § 1981 claim." Petition at 25. As demonstrated above, the Second Circuit did not hold otherwise; indeed it specifically noted the distinction between § 1981 and § 1982 (P. App. 16a) and cited the Fifth Circuit's opinion in *Gonzalez* (*id.*).

ment boil down to the claim that factual material introduced by him in an attempt to defeat summary judgment was disregarded or inferences to be drawn therefrom were resolved against him.[11]

At bottom, Murray is claiming that respondents admitted that his idea was novel. The issue centers on the agreement between NBC and the Carsey-Werner Company, the producers of *The Cosby Show*, whereby Carsey-Werner agreed to provide NBC with a demonstration tape and several fully-produced episodes of *The Cosby Show*, and NBC agreed to pay for a license to broadcast these episodes and finance certain production costs. Murray relies upon a remedial provision of this agreement which states: "Willful failure by the packager [*i.e.*, Carsey-Werner] to perform hereunder shall cause NBC irreparable loss of a unique, intellectual property warranting equitable relief to prevent such a loss." J. App. 257a.

As the Second Circuit realized, this provision, obviously meant to provide the basis for injunctive relief in lieu of money damages, could only apply to a fully-produced program, not to the underlying concept:

> The Carsey-Werner contract contemplates a fully-produced television series. The contract refers to, *inter alia*, the program format, titles, set designs, theme music, stories, scripts, and art work as well as to the "program idea."

P. App. 12a-13a.

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11 The courts below faithfully adhered to the summary judgment standards set forth in Fed. R. Civ. P. 56(c) and this Court's holdings in *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242 (1986), *Celotex Corp.* v. *Cartrett*, 477 U.S. 317 (1986), and *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574 (1986).

The courts below found that petitioner presented no facts showing that his idea was novel and the "failure of proof on [this] essential element of [his] case . . . 'necessarily render[ed] all other facts immaterial.' " P. App. 36a (quoting *Celotex*, 477 U.S. at 323). As the Court of Appeals concluded, "after drawing all reasonable inferences in favor of" petitioner, "no reasonable trier of fact could find in [his] favor." P. App. 9a.

The dissent below reasoned that the purpose for the remedial clause was to protect the underlying idea and insure its return to NBC: "In other words, from the outset NBC wanted to make certain that if its relationship with Carsey-Werner faltered, the novel idea it had given Carsey-Werner would be protected from disclosure." P. App. 20a.[12] This is factually incorrect. The agreement gave NBC no rights at all in the program idea. NBC has no power under the agreement to limit disclosure of the program concept; rather, it was granted the right, on network television, to broadcast the fully-produced programs supplied by Carsey-Werner. The purpose of the injunctive clause is, clearly, to stop the producers from delivering the fully-produced program to another telecaster, and forcing NBC to prove damages. There is simply no reasonable inference of admission of novelty that can therefore be drawn from this document.

Likewise, statements by Brandon Tartikoff or Bill Cosby that *The Cosby Show* is unique are irrelevant. The fact that *The Cosby Show* as broadcast is unique does not answer the legal question of whether petitioner's proposal for a non-stereotyped situation comedy is novel under New York law. *See McGhan* v. *Ebersol*, 608 F. Supp. 277, 287 (S.D.N.Y. 1985) (plaintiff "cannot rely on the press releases distributed by NBC to promote the show and listing the show as 'revolutionary' and containing 'a substantial amount of feature material that viewers won't be able to see anywhere else' as proof that he contributed novel ideas to [the show where he] has been unable to point to *any specific component* . . . that did not have its origin either in [another specific show] or in the industry in general") (emphasis added).

D. The Decision of the Court Below Does Not Violate Petitioner's Due Process Rights

Petitioner's final argument is that somehow he has been "arbitrarily and capriciously deprived of his property without due process of law" in violation of the Fifth Amendment by the

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12 Murray's statement (Petition at 19) that NBC retained rights in the program idea of *The Cosby Show* is flatly false. It has no foundation in the agreement or in the record.

action of the Court of Appeals. Apparently, this refers to the conduct of the court below in not agreeing with petitioner's citations of law.[13] Petitioner does not, and cannot, cite a single case finding a violation of due process on facts that even remotely resemble those of record here. His entire due process argument proceeds from his stubborn refusal to accept the fundamental premise of New York intellectual property law that " '[n]ot every good idea is a legally protectible idea.' " *Ed Graham Productions, Inc.* v. *National Broadcasting Co.*, 75 Misc. 2d 334, 337, 347 N.Y.S.2d 766, 769 (Sup. Ct. N.Y. Co. 1973).

The centerpiece of petitioner's Fifth Amendment argument is the Second Circuit's asserted refusal to follow *Werlin* v. *Reader's Digest Ass'n*, 528 F. Supp. 451 (S.D.N.Y. 1981). In *Werlin*, the plaintiff, a professional writer, sent Reader's Digest Association ("Reader's Digest") for possible *republication* an article she had previously published in a local paper. Reader's Digest liked the idea but not her writing, and proceeded to write and publish its own article on the same obscure subject. Expressly limiting its holding "to the facts of the case before it," the district court upheld Werlin's quasi-contract claim alone (dismissing claims of copyright infringement and misappropriation and awarding damages of $500) upon finding that Reader's Digest, which was actively offering to reprint *already published* articles, would not have "come across Werlin's article had she not mailed it in." 528 F. Supp. at 466.

NBC has engaged in no such offering, and it had already "found" Bill Cosby and his humor, as well as the family situation comedy genre, well before petitioner made his proposal in 1980. In fact, NBC broadcast both *I Spy* (1965-68) and *The Bill Cosby Show* (1969-71) years before Murray put pen to paper on

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13 Although the petition itself is vague on this issue, Murray does not appear to be urging that the actions of the courts below denied him procedural due process in any sense. If that *is* one of his claims, it is completely without merit. The motion for summary judgment was granted on the eve of trial after the close of all discovery. Murray has never suggested, as the dissent below implies (P. App. 18a), that he needed additional discovery to respond to the motion.

"Father's Day." Murray's claim that the Second Circuit violated his Fifth Amendment rights by failing to agree with his interpretation of an opinion that the Southern District of New York expressly limited to its own facts simply does not warrant review by this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

October 26, 1988

Respectfully submitted,

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No. 88-375

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

HWESU S. MURRAY,

Petitioner.

vs.

NATIONAL BROADCASTING COMPANY, INC., and BRANDON TARTIKOFF,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S BRIEF IN REPLY

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PETITIONER'S BRIEF IN REPLY

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Petitioner Hwesu S. Murray respectfully submits this brief in reply to an argument first raised in

Respondents' Brief In Opposition ("Opp. Br.") to petitioner's Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit.

ARGUMENT

RECOGNIZING THE ABSENCE OF MERIT IN THEIR "LACK OF NOVELTY" ARGUMENT, RESPONDENTS IMPROPERLY SEEK TO SUSTAIN THE GRANT OF SUMMARY JUDGMENT ON A NEW GROUND

Respondents argue that the Petition should be denied and the decision below let stand because one of petitioner's claims - for conversion - either is deficient on its merits or is preempted by the Copyright Act, 17 U.S.C. §301,

citing Harper & Row, Publishers, Inc. v. Nation Enterprises, 723 F.2d 195, 201 (2d Cir. 1983), rev'd on other grounds, 471 U.S. 539 (1985) (Opp. Br., p. 8, fn. 7).

It is respectfully submitted that the conversion claim is valid, as evidenced by respondents' failure to address the cases establishing that (Petition, pp. 58-60). It is also respectfully submitted that that claim is not preempted, as this is not a case involving use and publication of specific words, i.e., the expression of an idea, as was the case in Harper & Row, Publishers, Inc. v. Nation Enterprises, supra.

However, the primary point for purposes of this proceeding is that

respondents' new argument is irrelevant to the errors in the decision below. Respondents concede that they "moved for and were granted summary judgment on a single, narrow ground..." - lack of novelty (Opp. Br., p.3). Therefore, such arguments may only become relevant, though still without merit, after the decision below is reversed and this case remanded to the District Court; that Court grants permission for respondents to move on such arguments; and such a motion is made and such arguments addressed.

It is respectfully submitted that the only possible relevance of the raising of these additional alleged grounds by respondents is their

recognition that their "lack of novelty" ground is lacking in merit.

CONCLUSION

For the reasons set forth in the Petition, a writ of certiorari should issue in this case to review the judgment and opinion of the Second Circuit Court of Appeals.

Dated: New York, New York
October 31, 1988

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